

Case No. \_\_\_\_\_

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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IN RE MURPHY-BROWN LLC,  
*Petitioner.*

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Petition for Writ of Mandamus to the  
United States District Court for the Eastern District of North Carolina in  
*McKiver v. Murphy-Brown, LLC*, No. 7:14-cv-180-BR,  
*McGowan v. Murphy-Brown, LLC*, No. 7:14-cv-182-BR,  
*Anderson v. Murphy-Brown, LLC*, 7:14-cv-183-BR,  
*Gillis v. Murphy-Brown, LLC*, 7:14-cv-185-BR, and  
*Artis v. Murphy-Brown, LLC*, 7:14-cv-237-BR

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**PETITION FOR WRIT OF MANDAMUS ON BEHALF OF  
MURPHY-BROWN LLC**

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## **PRELIMINARY STATEMENT**

Petitioner Murphy-Brown LLC (dba Smithfield Hog Production Division) challenges an unconstitutional gag order that enjoins Petitioner and hundreds of other individuals from speaking publicly about matters in twenty-six cases pending in the Eastern District of North Carolina. *See* Ex. 1. The district court entered the order *sua sponte* with no forewarning, without a sufficient basis to conclude that such a sweeping prior restraint is necessary, and without evaluating whether less restrictive measures would protect the impartiality of the potential jury pool. Because the order plainly violates the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment, the Court should issue a writ of mandamus and vacate the order.

## **STATEMENT OF FACTS**

### **A. The Swine Farm Nuisance Litigation.**

In twenty-six separate cases filed in the Eastern District of North Carolina, more than five hundred plaintiffs have brought private nuisance claims against Murphy-Brown LLC alleging, among other things, that odors, flies, and truck traffic from hog farms have substantially interfered with the use and enjoyment of their properties. In 2015, the district court consolidated the lawsuits into a Master Case docket. *In re: N.C. Swine Farm Nuisance Litigation*, Master Case No. 5:15-cv-00013-BR. The court selected five lawsuits for detailed discovery, designating

those cases as the “Discovery Pool Cases.”<sup>1</sup> *See* No. 5:15-cv-00013-BR, ECF No. 476 at 1. After discovery in those cases concluded, the court ordered a series of staggered trials for the Discovery Pool Cases. *See* No. 5:15-cv-00013-BR, ECF No. 488.

Eleven separate trials involving plaintiff subgroups are contemplated for the first five Discovery Pool Cases. At the current rate of progress, those trials will not be completed until sometime in 2019. The court is beginning to open discovery in the next batch of cases and will set them for trial in turn. All told, final resolution of the pending twenty-six nuisance cases will take several years.

The first trial—involving a subgroup of ten plaintiffs in *McKiver v. Murphy-Brown, LLC*, No. 7:14-cv-180-BR—commenced on April 2, 2018. During jury selection, the district court conducted *voir dire* to determine whether potential jurors could be impartial. Two admitted they had heard about the case before coming to court. The first potential juror had seen a news story about the case and admitted that he had formed an opinion about the merits. *See* Ex. 2 at 43:17-44:21. The district court excluded him from the jury pool. *Id.* at 67:16-17. The second potential juror also heard a story on the news but said he could remain impartial.

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<sup>1</sup> The Discovery Pool Cases are *McKiver v. Murphy-Brown, LLC*, No. 7:14-cv-180-BR; *McGowan v. Murphy-Brown, LLC*, No. 7:14-cv-182-BR; *Anderson v. Murphy-Brown, LLC*, No. 7:14-cv-183-BR; *Gillis v. Murphy-Brown, LLC*, No. 7:14-cv-185-BR; and *Artis v. Murphy-Brown, LLC*, No. 7:14-cv-237-BR.

*See id.* 60:2-61:6. The judge permitted him to remain but plaintiffs' counsel used a peremptory strike to remove him. *Id.* at 121:5. At the end of the eighteen-day trial, the jury awarded each of the ten plaintiffs \$75,000 in compensatory damages and \$5,000,000 in punitive damages (reduced to \$250,000 each under North Carolina law). *See McKiver*, No. 7:14-cv-180-BR, ECF Nos. 267, 277.

The second trial—involving two plaintiffs in *McGowan v. Murphy-Brown, LLC*, No. 7:14-cv-182-BR—started on May 29. As before, the district court conducted *voir dire* of the jury venire. This time, eleven of fifty potential jurors said they had heard about the case, but ten said it would not prevent them from being impartial.<sup>2</sup> Two of those ten ended up on the jury. *See Ex. 3* at 113:10-16.

During the *McGowan* trial, the district judge was informed that a juror had been conducting internet research during the trial and speaking to other jurors about it. *See Ex. 4* at 2. The court's inquiry revealed conflicting accounts of what happened, but jurors who learned some of that information assured the court that they could remain impartial. *Id.* at 19:18-21, 26:11-15, 30:12-18, 33:9-13, 39:4-10, 45:22-46:5, 54:3-9. Although Petitioner requested a mistrial, *id.* at 57, the

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<sup>2</sup> *See Ex. 3* at 34:8-25; 35:1-25; 36:3-21; 36:24-37:17; 38:23-39:12; 41:3-19; 43:13-19; 48:7-49:2; 52:14-53:3; 54:16-55:8. The district court excused one member of the venire because she had formed an opinion about the issues in the case. *See id.* 47:9-48:4. Murphy-Brown struck for cause one other member of the venire who had read media reports about the case. *See id.* 90:3-13.

court denied the motion. *See McGowan*, No. 7:14-cv-182-BR ECF (June 22, 2018 Dkt ref.).

At the end of that twenty-three-day trial, the jury awarded each of the plaintiffs \$65,000 in compensatory damages and \$12,500,000 in punitive damages. *See McGowan*, No. 7:14-cv-182-BR, ECF No. 279.

The third trial commences on July 11, 2018, involving a subgroup of plaintiffs in *Artis v. Murphy-Brown, LLC*, 7:14-cv-237-BR.

#### **B. The District Court's Gag Order.**

On June 27, 2018, two days before the jury verdict in *McGowan*, the district court *sua sponte* entered a broad order limiting the freedom of persons involved in the litigation to speak about the cases. *See* Ex. 1 (the "Gag Order").<sup>3</sup> The Gag Order prohibits all parties and their lawyers, representatives, and agents, as well as "all potential witnesses," from

giv[ing] or authoriz[ing] any extrajudicial statement or interview to any person or persons associated with any public communications media or that a reasonable person would expect to be communicated to a public communications media relating to the trial, the parties or issues in this case which could interfere with a fair trial or prejudice any plaintiff, the defendant, or the administration of justice and which is not a matter of public record. Statements of information intended to

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<sup>3</sup> The district court entered the Gag Order under the captions of the Discovery Pool Cases, but in a footnote the court noted that "this litigation" entailed twenty-six cases filed against Murphy-Brown. *See* Gag Order at 2. n.1.



influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party.

*Id.* at 3. The order does not define “public communications media.” The district court made no factual findings of what actions or events necessitated the Gag Order except to say that it was based on “the volume and scope of prejudicial publicity observed” in the first two trials and “the substantial risk of additional publicity tainting or biasing future jury pools.” *Id.* The Gag Order will not expire “until the final verdict in these cases.” *Id.*

The Gag Order includes certain exceptions. Provided they do so “without elaboration or any kind of characterization whatsoever,” covered individuals may make statements about “the general nature of an allegation or defense”; “information contained in the public record of this case”; “scheduling information”; and “any decision made or order issued by the court which is a matter of public record.” *Id.* at 3-4. Covered individuals may also “[e]xplain[], without any elaboration or any kind of characterization whatsoever, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record,” as well as “any ruling made thereon to the extent that such ruling is a matter of public record.” *Id.* at 4.<sup>4</sup>

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<sup>4</sup> The Gag Order also restricts court personnel from making unauthorized disclosures of “information relating to this case that is not part of the public records of this court.” Gag Order at 4.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether the Gag Order violates the Free Speech Clause of the First Amendment because it prohibits all known and potential trial participants from expressing opinions about matters in the pending cases without any basis in the record to show that such an extreme restriction on protected speech is necessary to protect the right to a fair trial.

2. Whether the Gag Order violates the Due Process Clause of the Fifth Amendment because it is unduly vague and open-ended.

## STATEMENT OF RELIEF SOUGHT

Petitioner seeks a writ of mandamus vacating the Gag Order.

## STATEMENT OF WHY THE WRIT SHOULD ISSUE

Mandamus should be granted when (1) “the petitioner has shown a clear right to the relief sought”; (2) the respondent has “a clear duty” to perform the act requested; and (3) “no other adequate remedy is available.” *In re First Fed. Sav. & Loan Ass’n of Durham*, 860 F.2d 135, 138 (4th Cir. 1988).

Petitioner satisfies these elements. Petitioner and other trial participants have a clear First Amendment right to speak and express opinions about matters involved in pending litigation without fear that comments reported directly or indirectly to “public communications media”—whatever that means—will constitute “elaboration or any kind of characterization” that will subject them to contempt proceedings. The district court has a clear duty to respect those

constitutional rights and the Gag Order is facially defective. And Petitioner lacks an adequate remedy because the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J., in chambers) (same).

## **I. MANDAMUS IS THE PROPER METHOD TO REVIEW AN UNCONSTITUTIONAL GAG ORDER.**

Fourth Circuit precedent makes clear that mandamus is the “preferred method of review” of orders restricting First Amendment rights in the context of ongoing trial proceedings. *In re The Wall Street Journal*, 601 F. App’x 215, 218 (4th Cir. 2015); *In re Charlotte Observer*, 882 F.2d 850, 852 (4th Cir. 1989) (same); *In re Wash. Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986) (same).

## **II. THE GAG ORDER VIOLATES THE FIRST AMENDMENT.**

### **A. The Gag Order is a Prior Restraint Subject to First Amendment Scrutiny.**

The Gag Order is an impermissible prior restraint on free speech because it prohibits dozens—if not hundreds—of individuals from speaking freely about facts related to the nuisance cases. Prior restraints “are the most serious and the least tolerable infringement on First Amendment rights” and constitute “one of the most extraordinary remedies known to our jurisprudence.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559, 562 (1976). The judicial disfavor of prior restraints derives from “a theory deeply etched in our law: a free society prefers to punish the few

who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis added). Even when imposed by courts, “the barriers to prior restraint remain high and the presumption against its use continues intact.” *Neb. Press*, 427 U.S. at 570.

To be sure, this Court has held that limited restrictions on the comments of lawyers and parties to a lawsuit may be appropriate in some circumstances to ensure the fairness of trial proceedings. *See In re Russell*, 726 F.2d 1007 (4th Cir. 1984). But that restriction must be “no greater than necessary.” *In re Morrissey*, 168 F.3d 134, 140 (4th Cir. 1999). Trial courts considering an order restricting speech must therefore carefully consider the needs and circumstances of a specific case and the character of the media coverage that might prejudice the jury pool. *See In re Charlotte Observer*, 882 F.2d at 854-56 (rejecting order restricting access to court documents despite “pervasive, sensational, [and] inflammatory” media attention). Only then may a court impose a prior restraint on the communications of trial participants.

A trial court must also remember that publicity—even significant publicity—does not automatically jeopardize the empaneling of an impartial jury. As the Supreme Court has emphasized, “[p]rominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require

*ignorance.” Skilling v. United States*, 561 U.S. 358, 381 (2010); *see Neb. Press*, 427 U.S. at 554, 565 (rejecting prior restraint despite media coverage that was “pervasive,” “concentrated,” and “adverse” to a particular party). The district court must consider whether the “publicity, unchecked, would *so* distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.” *Neb. Press*, 427 U.S. at 569 (emphasis added); *see also Skilling*, 561 U.S. at 384 (explaining that publicity must be “the kind of vivid, unforgettable information” that is “particularly likely to prejudice” to implicate the right to an impartial jury).

**B. The District Court Entered the Gag Order Without Any Factual Findings or Support.**

At the threshold, the Gag Order must be vacated because it is facially invalid: the district court failed to make the necessary findings to warrant such drastic relief. Whenever a trial court restrains First Amendment rights in a judicial proceeding, it must make specific findings to support the infringement and to explain why less restrictive measures would not suffice. *Cf. In re Charlotte Observer*, 882 F.2d at 853 (holding that, before closing proceedings, trial courts must “give interested parties prior notice and an opportunity to be heard before deciding the issue” and should “support any decision to close with reasons and findings of record, including why no less drastic alternatives to closure are

feasible”); *In re Wash. Post Co.*, 807 F.2d at 391 (emphasizing the need for a record “specific enough to enable the reviewing court to determine whether closure was proper”). The lack of a detailed explanation not only prevents the parties from understanding what conduct led to the gag order but also thwarts appellate review. *See In re State-Record Co., Inc.*, 917 F.2d 124, 129 (4th Cir. 1990) (“[W]e have required specific reasons and findings on the record, because without such findings, *de novo* review is difficult.”) (internal citation omitted).

This Court’s decision in *Russell* outlines the vigilant approach that a trial court should take before restricting the First Amendment rights of trial participants. In that case, the trial court prohibited potential witnesses in a high-profile criminal prosecution from speaking about their proposed testimony. *Russell*, 726 F.2d at 1008. The court’s order defined a “potential witness,” leaving no doubt to whom the proscription applied. *See id.* at 1009. In a ten-page opinion accompanying the order, the court explained the basis for its decision, describing the “intense local and national publicity” surrounding the proceedings and recounting that the statements and representations made by the witnesses and their counsel would be “highly prejudicial” to the defendants. *Id.* And the court considered—and rejected—alternatives to the prior restraint, including “a change of venue” or “the possibility of using only jury control measures.” *Id.* At the end of its analysis, the trial court found “a reasonable likelihood that the defendants would be denied a

fair trial without proscribing certain of [the witnesses'] extrajudicial statements.”

*Id.* at 1010. This Court upheld the legality of the order and denied mandamus relief. *Id.* at 1011.

The district court took none of those essential steps here. The court did not enter the Gag Order on the motion of any party, nor did it seek out the parties' positions on the matter or hold a hearing on the issue. More critically, the court failed to identify the specific basis for the Gag Order except to refer vaguely to “prejudicial publicity observed in *McKiver* and *McGowan*.” Gag Order at 3. Yet the Gag Order did not identify that publicity, let alone explain how it was prejudicial or why the parties and witnesses should be muzzled to try to stop it. Even though the Gag Order suggests that publicity will risk tainting future potential jury pools, the district court never explained how it reached that conclusion or identified which side was likely to bear the risk of that prejudice. The lack of any such supporting record invalidates the Gag Order. *See In re State-Record Co.*, 917 F.2d at 129 (“On the present record, we cannot adequately review the trial court’s finding that there is no adequate alternative to sealing the public record until such time as it no longer poses a threat to the selection of an impartial jury.”).

**C. Less Restrictive Alternatives Would Protect the Proceedings from Potential Prejudice.**

A trial court must also consider less restrictive alternatives before subordinating the First Amendment rights of persons involved in judicial proceedings. *See Neb. Press*, 427 U.S. at 565 (rejecting prior restraint where “the record is lacking in evidence to support” the conclusion that alternative “measures might not be adequate”). The district court failed to address any such alternatives. Yet numerous alternatives exist to protect the impartiality of jury pools without severely restricting the speech rights of trial participants.

*Voir dire* provides the “preferred safeguard against” pretrial publicity. *In re Charlotte Observer*, 882 F.2d at 855. Indeed, courts should have “confidence that *voir dire* can serve *in almost all cases* as a reliable protection against juror bias however induced.” *Id.* at 856 (emphasis added); *see also Press-Enterprise Co. v. Superior Court of Calif.*, 478 U.S. 1, 15 (1986) (“Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.”). Through that process, a court can assure “that jurors will set aside their preconceptions when they enter the courtroom and decide cases based on the evidence presented.” *Skilling*, 561 U.S. at 399 n.34.

The district court’s *voir dire* when empaneling jurors in *McKiver* and *McGowan* showed the effectiveness of that traditional safeguard. Nothing about



jury selection in those cases suggested that it would not be an effective tool in future cases. That experience in the first two cases echoes the Supreme Court's observation in *Gentile v. State Bar*, 501 U.S. 1030 (1991), that "[e]mpirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base the verdict upon the evidence presented in court." *Id.* at 1054.

More to the point, the Gag Order does not reflect that the district court even considered whether a more searching *voir dire* would address concerns down the line.<sup>5</sup> And failing to consider that preferred alternative to a sweeping prior restraint gave it "much too short shrift." *In re Charlotte Observer*, 882 F.2d at 855.

Although *voir dire* is the best prophylactic, other alternatives would also protect the parties' trial rights without treading on their First Amendment freedoms. The vast majority of the members of the jury pool in the *McKiver* and *McGowan* trials did not report prior knowledge of the litigation. But if the district

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<sup>5</sup> Even when a juror improperly conducted outside internet research in *McGowan* in violation of the district court's instructions, the district court did not find that it warranted a mistrial. To the extent that episode motivated the Gag Order, the district court failed to match the remedy to the problem. A trial court cannot prevent members of the jury from violating their oaths by limiting the parties' abilities to make public statements. Of course, because the district court provided no specific basis for entering the Gag Order, we do not know if the juror-misconduct issue in *McGowan* played any role in its issuance.

court in future cases finds otherwise, it could expand the size of the pool as needed. The court could also consider sequestering the jury if it thought that necessary to ensure that outside communications do not influence their views of the case. (Murphy-Brown does not favor sequestration, however, in light of the other alternatives.) And barring the effectiveness of those remedies, the court could transfer venue to another district or division. The Gag Order did not consider any of those alternatives, let alone explain why they were not preferable to a multi-year prior restraint on the speech of the parties and trial participants.

Finally, to the extent that the district court worried that attorneys' statements would prejudice the potential jury pool, the court not only failed to identify any such statements, but it also overlooked the less restrictive measure imposed by North Carolina's Rules of Professional Conduct. Rule 3.6(a) already prohibits a lawyer from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." That standard (prohibiting statements that pose a "*substantial likelihood* of materially prejudicing" the proceeding) is far more narrowly tailored than the one imposed by the Gag Order (barring statements that "*could* interfere with a fair trial or prejudice any plaintiff, the defendant, or the administration of justice"). Compare N.C.R.P.C. 3.6(a) with Gag Order at 2.

Relying on the Professional Rules to punish specific misconduct is consonant with the Supreme Court's preferred method to "punish the few who abuse rights of speech *after* they break the law," instead of "throttling them and all others beforehand." *Se. Promotions*, 420 U.S. at 559.

**D. The Gag Order Irreparably Harms First Amendment Freedoms.**

As noted above, "even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect." *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J., in chambers). The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Thus, "[v]iolations of first amendment rights constitute per se irreparable injury." *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978).

The speech-stifling effect of the Gag Order was evident when the *Wall Street Journal* reported on the verdict in *McGowan* on June 29, shortly after the Gag Order issued. Valerie Bauerlein, *Pork Giant Loses Essential Legal Battle in Manure Case*, Wall Street Journal (June 29, 2018), <https://www.wsj.com/articles/pork-giant-loses-essential-legal-battle-in-manure-case-1530314322> (Ex. 5). Murphy-Brown's representatives, as the article noted,

“declined to comment, citing a gag order.” *Id.* The gag order not only precluded Murphy-Brown from identifying the many legal errors that led to the verdict but even from saying that it disagrees with the verdict and intends to appeal. In the meantime, the article reported how

Environmentalists cheered the verdict, saying it could force a change in how hog manure is handled here. “In the end, it would be much better for the swine industry to replace all the lagoons and sprayfields so that our state’s rural economy can grow with the new construction activity that lagoon conversion would bring,” said Ryke Longest, professor at Duke University’s law school.

*Id.*

The Gag Order thus prevents Murphy-Brown from defending itself while giving its critics free reign to publish factually erroneous claims and slanted opinions without rebuttal. Such one-sided treatment both violates Murphy-Brown’s free speech rights and jeopardizes the impartiality of a jury pool that is exposed to a lopsided message critical of Murphy-Brown’s business practices.

### **III. THE GAG ORDER IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.**

Separate from its First Amendment defects, the Gag Order should also be vacated because it is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. Due process requires fair notice of what the law prohibits. *See Gentile*, 501 U.S. at 1048. The use of general or vague terms in a court order violates that requirement if the reader must “guess at its contours.” *Id.*

In *Gentile*, the Supreme Court struck down a state bar rule prohibiting speech about a lawsuit that went beyond discussing the “general nature” of the defense “without elaboration.” *Id.* Because the terms “‘general’ and ‘elaboration’ are both classic terms of degree . . . [t]he lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.” *Id.* at 1048-49.

So too here. The Gag Order permits statements about “the general nature of an allegation or defense,” so long as the individual does so “without elaboration or any kind of characterization whatsoever.” Order at 3. The Gag Order allows an individual to explain “the contents or substance of any motion or step in the proceeding,” but that explanation must be “without any elaboration of any kind of characterization whatsoever.” *Id.* at 4. The Gag Order’s relative terms—general, substance, elaboration, characterization—defy fair notice. Just as in *Gentile*, therefore, an individual reading the Gag Order “has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.” 501 U.S. at 1049.

The scope of the Gag Order is also unclear. The district court entered the Gag Order under the docket number for the *McGowan* case, but the caption lists all five Discovery Pool Cases. Then, when referring to “this litigation,” the Gag Order references all twenty-six private-nuisance cases. *See* Gag Order at 2 n.1.

And the Gag Order lasts “until the final verdict in *these* cases,” *id.* at 3, but the individuals covered by the order must not make prejudicial statements “relating to the trial, the parties or issues in *this* case,” *id.* So does the Gag Order apply to the five Discovery Pool Cases or all twenty-six lawsuits? The Gag Order does not say. That ambiguity chills the First Amendment rights of everyone involved in all twenty-six cases.

The Gag Order also fails to make clear exactly to whom it applies. For example, it enjoins statements by “all potential witnesses,” but unlike the order in *Russell*, that term remains undefined and open-ended. Discovery has not yet proceeded in 21 of the 26 cases, so the pool of “all potential witnesses” is not yet known. The universe of individuals who must watch what they say remains undefined and unclear. *Cf. United States v. King*, 192 F.R.D. 527, 536 (E.D. Va. 2000) (requiring service of a gag order on all those subject to its provisions).

The Gag Order is plagued by other vague terms as well. Individuals may not make statements to “public communications media,” but what does that mean? Gag Order at 3. Does it mean traditional media outlets, like newspapers and television, or does it include anyone’s social media account? Does it matter if the social media account is public or private? Compounding that uncertainty, the proscription extends to statements “that a reasonable person *would expect to be*

*communicated to a public communications media.” Id.* Does that prohibit conversations with persons who might be interviewed by bloggers or journalists?

The Gag Order also restricts dissemination of information “which is not a matter of public record,” but it fails to explain what constitutes the “public record.” *Id.* at 3. Does the public record include only statements made to the court in these proceedings, or does it capture any information that is generally known to the public?

Finally, the Gag Order is overbroad in scope and insufficiently limited in duration. *See Tory v. Cochran*, 544 U.S. 734, 738 (2005) (recognizing that an injunction without a sustained “plausible justification” “amounts to an overly broad prior restraint upon speech”). By covering all parties and “all potential witnesses,” the Gag Order applies not only to future trials but to trials that have already ended. In extreme cases when a gag order is necessary to protect the fairness of the proceeding, the order will expire when the jury returns its verdict. The Gag Order here purports to live on indefinitely until, apparently, the last trial is finished involving the last of the plaintiffs in the twenty-sixth case.

Given that it will take years to finally resolve the trials and appeals in the twenty-six pending cases, the Gag Order will muzzle the parties and witnesses from publicly expressing their opinions about the correctness of the trial court’s

rulings, the impact on the pork industry, and the effect on the community and the State of North Carolina. That wildly overbroad prohibition cannot be sustained.

### **CONCLUSION**

Such a long-lasting and open-ended restriction on the First Amendment rights of so many people is unprecedented and cannot stand. The Court should issue a writ of mandamus declaring the Gag Order unconstitutional and barring the district court from enforcing it.

### **STATEMENT REGARDING ORAL ARGUMENT**

Because the Gag Order at issue in this case is facially invalid and overbroad, lacking any factual record to support the extreme measure of an open-ended prior restraint, the Court should issue a summary order granting mandamus and vacating the Gag Order. If the Court is not inclined to issue a summary determination, Petitioner submits that the unprecedented nature of the Gag Order warrants oral argument to consider the significant constitutional issues presented.

Dated: July 6, 2018

Respectfully submitted,

/s/ Stuart A. Raphael

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

1. This petition complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because the portion of the petition subject to that rule is 4,377 words and therefore does not exceed the 7,800-word limit.

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Times New Roman typeface using Microsoft Word.

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## CERTIFICATE OF SERVICE

I certify that on July 6, 2018, I caused true and correct copies of the Petition for a Writ of Mandamus to be served upon counsel for the parties and upon the District Court as follows:

### **By Overnight Delivery:**

The Honorable W. Earl Britt  
United States District Court  
Eastern District of North Carolina  
310 New Bern Avenue  
Raleigh, NC 27601

### **And Email to:**

Ms. Amy Petty  
Staff Attorney to Senior U.S. District Judge W. Earl Britt  
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Eastern District of North Carolina  
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*Counsel to Plaintiffs in:*

*In re: NC Swine Farm Nuisance Litig., Master Case No. 5:15-CV-13-BR  
Anderson, et al. v. Murphy-Brown, LLC, 7:14-CV-183-BR*

*Artis, et al. v. Murphy-Brown, LLC, 7:14-CV-237-BR*  
*Baker, et al. v. Murphy-Brown, LLC, 7:14-CV-227-BR*  
*Barton, et al. v. Murphy-Brown, LLC, 7:14-CV-218-BR*  
*Bennett, et al. v. Murphy-Brown, LLC, 7:14-CV-236-BR*  
*Blanks, et al. v. Murphy-Brown, LLC, 7:14-CV-219-BR*  
*Blow, et al. v. Murphy-Brown, LLC, 7:14-CV-232-BR*  
*Branch, et al. v. Murphy-Brown, LLC, 7:14-CV-200-BR*  
*Brown, et al. v. Murphy-Brown, LLC, 7:14-CV-245-BR*  
*Collier, et al. v. Murphy-Brown, LLC, 2:14-CV-56-BR*  
*Cromartie, et al. v. Murphy-Brown, LLC, 7:14-CV-238-BR*  
*Faison, et al. v. Murphy-Brown, LLC, 7:14-CV-229-BR*  
*Farrior, et al. v. Murphy-Brown, LLC, 7:14-CV-184-BR*  
*Fullwood, et al. v. Murphy-Brown, LLC, 7:14-CV-228-BR*  
*Gillis, et al. v. Murphy-Brown, LLC, 7:14-CV-185-BR*  
*C. Herring, et al. v. Murphy-Brown, LLC, 7:14-CV-233-BR*  
*E. Herring, et al. v. Murphy-Brown, LLC, 7: 14-CV -199-BR*  
*Humphrey, et al. v. Murphy-Brown, LLC, 7:14-CV-234-BR*  
*Lisane, et al. v. Murphy-Brown, LLC, 7:14-CV-201-BR*  
*McGowan, et al. v. Murphy-Brown, LLC, 7:14-CV-182-BR*  
*McKiver, et al. v. Murphy-Brown, LLC, 7:14-CV-180-BR*  
*McMillon, et al. v. Murphy-Brown, LLC, 7:14-CV-181-BR*  
*Miller v. Murphy-Brown, LLC, 7:14-CV-217-BR*  
*Pearson, et al. v. Murphy-Brown, LLC, 5:14-CV-663-BR*  
*Webb, et al. v. Murphy-Brown, LLC, 4:14-CV-152-BR*

/s/ Stuart A. Raphael

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# Exhibit 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

JOYCE MCKIVER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 7:14-CV-180-BR
	)	
MURPHY-BROWN, LLC, d/b/a	)	
SMITHFIELD HOG PRODUCTION	)	
DIVISION,	)	
	)	
Defendant.	)	
_____	)	

WOODELL MCGOWAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 7:14-CV-182-BR
	)	
MURPHY-BROWN, LLC, d/b/a	)	
SMITHFIELD HOG PRODUCTION	)	
DIVISION,	)	
	)	
Defendant.	)	
_____	)	

EUNICE ANDERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 7:14-CV-183-BR
	)	
MURPHY-BROWN, LLC,	)	
	)	
Defendant.	)	
_____	)	

ANNJEANETTE GILLIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 7:14-CV-185-BR
	)	
MURPHY-BROWN, LLC,	)	
	)	
Defendant.	)	
_____	)	

BEN ARTIS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 7:14-CV-237-BR
	)	
MURPHY-BROWN, LLC d/b/a	)	
SMITHFIELD HOG PRODUCTION	)	
DIVISION,	)	
	)	
Defendant.	)	
_____	)	

### ORDER

This matter is before the court sua sponte. See Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1305 (1983). Given the continuing nature of this litigation,<sup>1</sup> and significant increase in trial publicity, the court issues an order to protect the parties’ fundamental “right to a fair trial by impartial jurors.” Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991); see Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946).

Court orders which limit extrajudicial statements by trial participants must balance the parties’ Sixth Amendment rights with the guarantees of the First Amendment. See Gentile, 501

---

<sup>1</sup> There are 26 cases involved in this litigation. See Case No. 5:15-CV-00013-BR. To date, there are nine jury trials scheduled sequentially until the end of this calendar year.

## EXHIBIT 1

U.S. at 1075; Sheppard v. Maxwell, 384 U.S. 333, 361-62 (1966). “In the Fourth Circuit, district courts may restrict extrajudicial statements by parties and counsel only if those statements present a reasonable likelihood of prejudicing a fair trial.” United States ex rel. Davis v. Prince, 753 F. Supp. 2d 561, 568 (E.D. Va. 2010) (internal quotations omitted); see In re Russell, 726 F.2d 1007, 1010 (4th Cir. 1984); Am. Science & Eng’g. Inc. v. Autoclear, LLC, 606 F. Supp. 2d 617, 625–26 (E.D. Va. 2008); accord United States v. Brown, 218 F.3d 415, 427 (5th Cir. 2000). Given the volume and scope of prejudicial publicity observed in McKiver and McGowan, and the substantial risk of additional publicity tainting or biasing future jury pools, the court adopts the following order:

IT IS ORDERED that from now until the final verdict in these cases, the plaintiffs, their counsel, representatives and agents, and defendant, its counsel, representatives and agents, and all potential witnesses shall not give or authorize any extrajudicial statement or interview to any person or persons associated with any public communications media or that a reasonable person would expect to be communicated to a public communications media relating to the trial, the parties or issues in this case which could interfere with a fair trial or prejudice any plaintiff, the defendant, or the administration of justice and which is not a matter of public record. Statements or information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party. Nothing set forth above shall prohibit any of the above parties from the following:

(1) Stating, without elaboration or any kind of characterization whatsoever:

- (a) the general nature of an allegation or defense made in this case;
- (b) information contained in the public record of this case;
- (c) scheduling information; or,



## EXHIBIT 1

(d) any decision made or order issued by the court which is a matter of public record.

(2) Explaining, without any elaboration or any kind of characterization whatsoever, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record in this case and any ruling made thereon to the extent that such ruling is a matter of public record.

IT IS FURTHER ORDERED that all courthouse personnel, including marshals, deputy marshals, guards, court clerks, deputy clerks, law clerks, secretaries, bailiffs and court reporters, shall under no circumstances disclose to any person, without express authorization by the court, information relating to this case that is not part of the public records of this court.

The court direct the parties' and public's attention to Local Civil Rules 83.4, 83.6, and 83.1(k).

This 27 June 2018.



---

W. Earl Britt  
Senior U.S. District Judge

## **Exhibit 2**

## EXHIBIT 2

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

----- )  
JOYCE McKIVER, et al, )  
 )  
Plaintiffs )  
 )  
vs. ) CASE NO. 7:14-CV-180-BR  
 )  
 )  
MURPHY-BROWN, LLC, )  
 )  
 )  
Defendant )  
----- )

MONDAY, APRIL 2, 2018  
JURY TRIAL/JURY SELECTION  
BEFORE THE HONORABLE W. EARL BRITT  
SENIOR UNITED STATES DISTRICT JUDGE

**MICHELLE A. McGIRR, RPR, CRR, CRC**  
Official Court Reporter  
United States District Court  
Raleigh, North Carolina  
Stenotype with computer-aided transcription

APPEARANCES:On Behalf of the Plaintiffs:

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**VALYCE DAVIS, Esquire**  
800 East Canal Street  
Richmond, Virginia 23219

1 (Monday, April 2, 2018 commencing at 9:06 a.m.)

2 **P R O C E E D I N G S**

3  
4 THE COURT: Good morning, everyone. The  
5 long-anticipated day has arrived. I hope everybody is ready.

6 MR. KAESKE: So do I, Your Honor.

7 JUDGE BRITT: I have a handful of stuff when I was  
8 coming in here and I left it somewhere. Go find it, Lauren.  
9 My laptop and a file.

10 (The Clerk providing items to the Court)

11 JUDGE BRITT: Okay. All right. The first thing I  
12 want to do is go over with counsel the order in which we're  
13 going to proceed today once the jury comes in. I will begin,  
14 of course, by swearing the panel as a whole, which is part of  
15 the normal procedure. Then I'll call the case for trial and  
16 introduce the parties that are here and the lawyers and then  
17 I will ask the jurors some questions designed to find out if  
18 they have any hardship that is materially different from  
19 their neighbor and for that purpose, the -- well, all the  
20 jurors are going to be seated on the first five rows -- and  
21 for that purpose, I've had Scott prepare me a chart. You  
22 can't have it because it's -- I want to know who I'm talking  
23 to there at the beginning and it includes the randomization.  
24 It would do away with the randomization so I'm sure you  
25 understand that, but neither side is going to get it.

1 relatives work at Smithfield.

2 JUDGE BRITT: Okay. That was the questions that  
3 you -- that you checked off, is that correct?

4 THE JUROR: Yes, sir.

5 JUDGE BRITT: Do you think because of that it would  
6 be difficult for you to be fair and impartial if you're  
7 selected, sir?

8 THE JUROR: No, sir.

9 THE COURT: You think in spite of the fact that a  
10 lot of your relatives work at Smithfield and you formerly  
11 lived in that area -- did you live near a hog farm?

12 THE JUROR: Actually, yes. It was maybe about  
13 20 feet from my house.

14 JUDGE BRITT: I see. I would say that's near.  
15 All right. Thank you very much. You may have a  
16 seat.

17 THE COURT: [REDACTED].

18 THE JUROR: Yes, sir.

19 JUDGE BRITT: Did you answer any yes?

20 THE JUROR: Yes, sir.

21 JUDGE BRITT: Which ones?

22 THE JUROR: I do believe I've heard about this  
23 case, a small story, before and I've heard of Murphy-Brown  
24 and I know somebody that's worked on a hog farm.

25 JUDGE BRITT: All right. Can you tell me the

1 source of your information about the case, if you say you've  
2 heard about it.

3 THE JUROR: I believe it was a small story on the  
4 local news channel, WRAL.

5 JUDGE BRITT: Would that have been in the last few  
6 days?

7 THE JUROR: I think it was a couple weeks ago. It  
8 wasn't in the last day or two.

9 JUDGE BRITT: All right. Well, after you heard  
10 that story, did you form or express any opinion as to the  
11 merits of the case, that is, one side or the other?

12 THE JUROR: I kind of did.

13 JUDGE BRITT: All right. Well don't tell me how  
14 though. Did you -- whatever you discovered about the case,  
15 do you think it would take some evidence on the part of the  
16 other side to remove that?

17 THE JUROR: Yes, sir.

18 JUDGE BRITT: I take it that you feel like because  
19 of what you have heard, it would be difficult for you to be  
20 fair and impartial if you're selected.

21 THE JUROR: Yes, sir.

22 JUDGE BRITT: All right. You may have a seat.

23 THE COURT: [REDACTED].

24 THE JUROR: No, Your Honor, I didn't check yes.

25 THE COURT: [REDACTED].

1 much. You may have a seat.

2 On the next row, [REDACTED].

3 THE JUROR: Yes, Your Honor.

4 JUDGE BRITT: One and four. Okay. You've heard  
5 something about the case before coming to court today?

6 THE JUROR: Yeah. I think I heard something about  
7 it on the news just in passing. Might not have been this  
8 one, but it was about a hog farm.

9 JUDGE BRITT: Well, if it's in the last few days.

10 THE JUROR: Been over a week, I think.

11 JUDGE BRITT: Okay. Well, whatever you heard, did  
12 you form or express any opinion about the matter?

13 THE JUROR: Nah, I take all news with a grain of  
14 salt.

15 JUDGE BRITT: And did you -- you haven't heard of  
16 Murphy-Brown in that same regard?

17 THE JUROR: Yeah, I could be impartial.

18 JUDGE BRITT: Regardless whatever you have heard,  
19 you haven't formed or expressed any opinion?

20 THE JUROR: No. Could you repeat the question.

21 JUDGE BRITT: Have you formed or --

22 THE JUROR: No.

23 JUDGE BRITT: -- expressed any opinion --

24 THE JUROR: No Your Honor.

25 JUDGE BRITT: --as a result of what you heard?



1 THE JUROR: No.

2 JUDGE BRITT: And you feel that you could be fair  
3 and impartial and base your verdict solely on the evidence  
4 that comes from the witness stand and my instructions to you  
5 on the law.

6 THE JUROR: Yeah, I think so, Your Honor.

7 JUDGE BRITT: Have a seat.

8 [REDACTED].

9 THE JUROR: I said yes to number four and number  
10 six.

11 JUDGE BRITT: All right. Can you tell me how you  
12 know about Murphy-Brown.

13 THE JUROR: Just heard of the company. Just in  
14 passing. Don't know any details.

15 JUDGE BRITT: How about number six.

16 THE JUROR: Number six, my husband was a former  
17 employee of Smithfield Foods. He's been gone probably ten  
18 years or so.

19 JUDGE BRITT: Do you think either of those factors  
20 would in any way interfere with your ability to be a fair and  
21 impartial juror in this case where Murphy-Brown is -- or  
22 Smithfield Foods are parties.

23 THE JUROR: No, sir.

24 THE COURT: Do you feel like you could listen to  
25 the evidence as it comes from the witness stand, my

## EXHIBIT 2

67

1 ourselves about a 10-minute recess and come back in.

2 (Brief Recess)

3 JUDGE BRITT: Can anybody tell me where plaintiffs'  
4 counsel is?

5 MR. ANDERSON: I think I know where their room is.  
6 I can run back and get them.

7 JUDGE BRITT: Glenna will go get them.

8 (Plaintiffs counsel entering the courtroom)

9 JUDGE BRITT: All right. Counsel, I'm going to go  
10 through the list and tell you the jurors that I have excused.  
11 This may -- it will include the ones that I excused earlier  
12 for -- under the first round. And the others are ones I am  
13 excusing and I may not have it indicated on here which one I  
14 was excusing them under so you need to mark these on your  
15 list.

16 Number 10, [REDACTED] is out. Number 17, [REDACTED]

17 [REDACTED]. Number 19, [REDACTED].

18 MR. KAESKE: Excuse me, sir. Could you go a little  
19 slower. I have to find them on the list, please.

20 JUDGE BRITT: Absolutely.

21 MR. KAESKE: Sorry. I lost you right after [REDACTED].  
22 Sorry.

23 JUDGE BRITT: 17. Did you get 17?

24 MR. KAESKE: We don't have numbers so I have to  
25 look for the names and that's why it took me a minute.

1 JUDGE BRITT: Oh, okay. All right. [REDACTED].

2 MR. KAESKE: Thank you, sir.

3 JUDGE BRITT: [REDACTED]. She was on the end  
4 of the first row. Do you have her?

5 MR. KAESKE: Yes, sir. Thank you.

6 JUDGE BRITT: [REDACTED], [REDACTED], [REDACTED]  
7 [REDACTED], [REDACTED]. I know that was one that was  
8 earlier. [REDACTED], [REDACTED], [REDACTED] and [REDACTED]  
9 [REDACTED].

10 Now I'll be glad to hear from you lawyers with  
11 respect to challenges for cause for any others who have  
12 answered the questions.

13 And Mr. Kaeske, I'll start with you.

14 MR. KAESKE: Your Honor, I would like to make a  
15 suggestion, since it seems clearly like we have enough jurors  
16 so far -- well, first a question. Are there more questions  
17 you're going to ask or is this the questions?

18 JUDGE BRITT: Oh, Lord, there is a pile more  
19 questions I'm going to ask.

20 MR. KAESKE: Okay.

21 JUDGE BRITT: We're going to put 24 in the box.

22 MR. KAESKE: Yes, sir.

23 JUDGE BRITT: And then I'm going to ask questions  
24 and some of which will be the questions that you all  
25 submitted and then I anticipate it will take us another 30,

1 JUDGE BRITT: That's one.

2 THE CLERK: Do you want to mark from this? It  
3 might be easier.

4 JUDGE BRITT: Thank you. Let me go back and get  
5 that.

6 MR. ANDERSON: Your Honor, we have Ms. [REDACTED] who  
7 is right there. Juror number 12.

8 JUDGE BRITT: You can call them by numbers if -- if  
9 you don't have this.

10 MR. ANDERSON: I don't have the numbers yet.

11 MR. KAESKE: [REDACTED].

12 MR. ANDERSON: Should be down in front. [REDACTED]

13 [REDACTED].

14 JUDGE BRITT: That's two for the defendant.

15 I did not tell you all, but I assume you're going  
16 to exercise all your peremptories, but if you should happen  
17 not to, then I will --

18 MR. ANDERSON: Go by your list.

19 JUDGE BRITT: I'll be required to excuse until we  
20 get down to 12 and I would do so in the reverse order in  
21 which they're called.

22 MR. ANDERSON: Okay.

23 JUDGE BRITT: Just so you know what I'll do. You  
24 can --

25 MR. KAESKE: [REDACTED].

1 JUDGE BRITT: That's three for the plaintiff.

2 MR. ANDERSON: My third, [REDACTED].

3 JUDGE BRITT: Okay. That's three for the  
4 defendant.

5 MR. KAESKE: [REDACTED].

6 JUDGE BRITT: Four for the plaintiff.

7 MR. ANDERSON: [REDACTED]. Number 16.

8 JUDGE BRITT: Four for the defendant.

9 MR. KAESKE: [REDACTED].

10 JUDGE BRITT: Did you see that --

11 MR. ANDERSON: [REDACTED].

12 JUDGE BRITT: Okay.

13 MR. ANDERSON: [REDACTED].

14 JUDGE BRITT: You know we had an assistant U.S.  
15 Attorney here with the same name. [REDACTED].

16 You have one more.

17 MR. KAESKE: [REDACTED].

18 JUDGE BRITT: You have one more.

19 MR. ANDERSON: [REDACTED].

20 JUDGE BRITT: All right. That's six each. Hold  
21 on. (Highlighting remaining juror names).

22 The ones who are highlighted are the ones you have  
23 approved.

24 MR. KAESKE: Now what do I do.

25 JUDGE BRITT: Just look at it.

1 MR. KAESKE: Okay.

2 JUDGE BRITT: If you disagree with me, that means  
3 you have approved one --

4 MR. KAESKE: I understand and I do. (Tendering  
5 document to Attorney Anderson).

6 MR. ANDERSON: That looks correct.

7 JUDGE BRITT: Speak now or forever hold your peace.  
8 Thank you.

9 **CONCLUSION OF BENCH CONFERENCE**

10 (Open Court)

11 JUDGE BRITT: We now have our jury. I'm going to  
12 call the names of those of you who have been excused from  
13 serving in this case. I would ask that you wait until I  
14 complete the calling of all the names before you start filing  
15 out. And when these jurors start filing out, the ones of you  
16 who remained in the courtroom may file out also because you  
17 will not be needed.

18 And all of you who are leaving will go with my  
19 thanks for making yourselves available for jury service and  
20 for coming here today and being questioned about this case.  
21 You have served your -- you have satisfied your obligation of  
22 serving on a jury in this district of the Federal Court for a  
23 period of two years so you won't be invited back during that  
24 time. And if you happen to be, if you tell the folks down in  
25 the clerk's office that you served here on April the 2nd --

# **Corrected Exhibit 3**

## CORRECTED EXHIBIT 3

Petitioner Murphy-Brown LLC originally filed an uncertified, realtime unedited transcript of the *McGowan* jury selection proceedings as Exhibit 3 to its Petition for Writ of Mandamus. Since filing the Petition, Petitioner has received a certified copy of the transcript from those proceedings. Excerpts from the certified transcript are being provided as Corrected Exhibit 3. The below table shows the locations of cited portions from the *McGowan* jury selection proceedings in Corrected Exhibit 3.

<b>Citation used in Petition</b>	<b>Location in Corrected Ex. 3</b>
34:8-25	35:4-21
35:1-25	35:22-36:20
36:3-21	36:23-15
36:24-37:17	37:18-38:11
38:23-39:12	39:19-40:8
41:3-19	41:22-42:17
43:13-19	44:13-19
47:9-48:4	48:8-49:2
48:7-49:2	49:6-50:1
52:14-53:3	53:15-54:4
54:16-55:8	55:17-56:9
90:3-13	93:8-18
113:10-16	116:25-117:8



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

McGOWAN, et al,  
Plaintiffs  
vs.  
MURPHY-BROWN, LLC,  
Defendant.

MAY 29, 2018  
JURY SELECTION and VOIR DIRE  
BEFORE THE HONORABLE W. EARL BRITT  
SENIOR UNITED STATES DISTRICT JUDGE

On Behalf of the Plaintiffs:

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Raleigh, North Carolina  
Stenotype with computer-aided transcription

1 PROCEEDINGS

2 (Tuesday, May 29, 2018, commencing at 9:42 a.m.)

3 THE COURT: Good morning, everyone. Glad to see  
4 everybody again after what, about a month?

5 MR. ANDERSON: Time flies.

6 THE COURT: I hope you had a good Memorial Day  
7 weekend and are ready to proceed with this case.

8 There's a few matters we need to take up in the  
9 absence of the jury.

10 The Court has some motions in limine that it has not  
11 ruled on and I need to do that at this time. Let me see, do we  
12 have everybody here just like we did before?

13 Is Ms. Mallette, was she here before?

14 MR. ANDERSON: She was not, Your Honor.

15 THE COURT: Glad to have you with us.

16 MS. MALLETT: Thank you, Your Honor. Happy to be  
17 here.

18 THE COURT: All right. The first one I have here to  
19 rule on is the motion by the defendant to reconsider the  
20 decision of the Court allowing plaintiffs' motion for summary  
21 judgment on the applicability of the Farm Act defense. That  
22 motion is denied.

23 The next motion is defendant's motion in limine to  
24 exclude evidence of diagnoseable medical conditions. My ruling  
25 on that motion is the same as it was in the first trial. And I

1 damages.

2 Plaintiffs are not claiming physical injury. They  
3 are also not claiming damage to their property from the hog  
4 operation.

5 Murphy-Brown contends that it is reasonable for it to  
6 contract with Joey Carter; that defendant and the operation  
7 comply with all existing regulations; that the operations are  
8 safe, and that the odors are properly managed.

9 I believe one -- at least one of you jurors has a  
10 problem hearing and we have provided you with a device. Are  
11 you able to hear okay?

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: You can hear me?

14 PROSPECTIVE JUROR: Yes, sir.

15 THE COURT: Good. Okay. Thank you.

16 All right. If one of the staff will hand out the  
17 sheets that I'm going to distribute to the jurors.

18 Members of the jury, my staff is going to hand you  
19 out a sheet and if you want to be reading it, you can. I'm  
20 going to go over it with you in a moment. You'll be provided  
21 with a pencil to indicate on there if you want to, unless you  
22 already have one, do you have pencils, Amy?

23 MS. PETTY: No. Scott should have handed them out.

24 THE COURT: Were you given pencils earlier?

25 ALL JURORS: No.

1 THE COURT: Maybe you can -- listen to this and then  
2 if anybody else wants -- needs a writing instrument, they can  
3 get it.

4 I want you to mark on the line indicated there if  
5 this applies to you. For example, the first question is: Have  
6 you heard anything about this or similar so-called hog farm  
7 cases, including any that have already been tried?

8 Now, if your answer to that question is yes, check  
9 that there. You're not going to be passing these back in so if  
10 you can remember, that would be just as well, or if you already  
11 have a pen. The way I'm going to do this is after I've gone  
12 through all the questions, I'm going to give you an opportunity  
13 to stand and tell me about your answers.

14 There's the man with the pencils.

15 The next thing is: Do you know any of the attorneys?  
16 If you do, check that yes.

17 Third question is: Do you know the plaintiffs or  
18 members of their families?

19 Now, as I've indicated -- what are the two  
20 plaintiffs' names, Counsel?

21 MR. KAESKE: Elvis and Vonnice Williams, Your Honor.

22 THE COURT: Members of the jury, I read out to you  
23 earlier the name of the case and that's Woodell McGowan and  
24 others, but this is just two of the plaintiffs who appear in  
25 that case and their names are Elvis and Vonnice Williams. They

1 live just outside of Beulaville down in Duplin County, North  
2 Carolina.

3 Have any of you ever heard of Murphy-Brown, LLC? If  
4 you have, check that.

5 Now I'm going to read to you a list of witnesses who  
6 may testify in this case. The fact that I read the names does  
7 not necessarily mean that they will testify. The purpose of  
8 reading this list is to find out if you know any of these  
9 people. Now, if you -- if the name sounds familiar, resolve  
10 any doubt in favor of checking it and let's talk about it  
11 because if it's somebody you think you know we might ask some  
12 questions like where they live or that type thing that would  
13 clarify who it is and we make sure that we on the same page.

14 Now, listen to the list and if you need to make some  
15 notes, do so.

16 Shane Rogers, Canton, New York; James Merchant, Iowa  
17 City, Iowa, Steve Wing, who is deceased, but he'll be  
18 testifying by a depo vision that was taken before his death.  
19 Kendall Thu, DeKalb, Illinois; Thomas Hubbard, Evanston,  
20 Illinois; Jeffrey Tomberlin, College Station, Texas; Larry  
21 Baldwin, Morehead City; Donald Butler, Smithfield, Virginia;  
22 Tom Butler, Lillington; Corey Robinson, Dolores, Colorado; John  
23 Sargent, Warsaw, North Carolina; Gregg Schmidt, Warsaw; John  
24 Wathen, Tuscaloosa, Alabama; Kraig Westerbeek, Warsaw; Derl  
25 Walker, Kenansville; Al Hodge, Washington, North Carolina;

1 Richard Shiver, Wilmington; Regina Frederick, Warsaw; Henrietta  
2 Maddox, Beulaville; Ray Outlaw, Beulaville; Samantha Pickett,  
3 Chinquapin; Darlene Bynum, Albertson; Dwayne Boyce, Lendora  
4 Farland, Beulaville; Marria McGowan, Turkey, North Carolina;  
5 Mary Miller, Beulaville; Mary Jo Loftin, Mt. Olive; Glenn Wade,  
6 Beulaville; Serena Sumler, Beulaville; Oscar Ellis, Beulaville;  
7 Leslie Leatherberry, Beulaville; Becky Lancaster, Sylva, North  
8 Carolina; Roger Pickett, Jacksonville, North Carolina; Richard  
9 Pickett, Beulaville; Samuel Branch, Mt. Olive; Jacqueline  
10 Valerio, Beulaville; Thelma Collins, Beulaville; Sheila Wimmer,  
11 Beulaville; Nancy Lambertson, Rich Square, North Carolina;  
12 Elvis Williams and Vonnie Williams both, they're the  
13 plaintiffs, from Beulaville; Elain Carlton, Beulaville; Anthony  
14 Carlton, Beulaville; David Carter, Beulaville; Dreama Carter,  
15 Beulaville; Kenneth Carter, Beulaville; LaTonya Carter, Robert  
16 Carter, Beulaville, Sabena Carter, Beulaville; James Davis,  
17 Senior, Beulaville; Jacqueline Davis, Beulaville; James Davis,  
18 Junior, Beulaville; Linnill Farland, Beulaville; Georgia  
19 Farland, Beulaville; Woodell McGowan, Beulaville; Dorothy Hill,  
20 Pink Hill, North Carolina; Cartha Williams, Beulaville, NC;  
21 Barbara Gibbs, Beulaville; Dale Bollinger, Elizabethtown; Ray  
22 Campbell, Raleigh; Matias Vanotti, Florence, South Carolina;  
23 Debra Taylor, Boone, North Carolina; Joey Carter, Matthew  
24 Carter, Cynthia Watson, Rose Hill, North Carolina; Jesse  
25 Ladson, Warsaw; Dr. Pamela Dalton, Philadelphia, Pennsylvania;

1 Dr. Herman Gibb, Arlington, Virginia; Dr. Richard Houseman,  
2 Columbia, Missouri; William Kreutzberger, Charlotte; Dr.  
3 Nicolas Piggott, Raleigh; Dr. Keith Ramsey, Greenville, North  
4 Carolina; Dr. Today See, Raleigh; Roger Waldon, Chapel Hill;  
5 Dr. Jennifer Clancy, St. Albans, Vermont; Dr. Lowery A. Harper,  
6 Watkinsville, Georgia; Dr. Terry Coffey, Rose Hill; Kraig  
7 Westerbeek, Warsaw; Dr. Gregg Schmidt, Warsaw; Dexter Edwards,  
8 Beulaville; Al Searles, Warsaw; Lynwood Harper, Warsaw; Alex  
9 Kennedy, Warsaw; Timothy -- or Timmy Nethercutt, Warsaw; Joey  
10 Carter, Beulaville; Neil Russell Barbee, Beulaville; Justin  
11 Davis, Beulaville; Greg Drinkwater, Beulaville; Justin Blake  
12 Hunter, Beulaville; John Clayton Kenan, Beulaville; Bobby  
13 Lanier, Beulaville; Lee Roy Leatherberry, Beulaville; James  
14 Newkirk, Beulaville; Wanda Newkirk, Beulaville; Paige Campbell  
15 Pickett, Beulaville; Jeremy Street, Beulaville; Jennifer  
16 Street, Beulaville; Willie Street, Beulaville; Debbie Street,  
17 Beulaville; Wes Trejo, Beulaville; Leslie Leatherberry,  
18 Beulaville; Kim Whaley, Beulaville; Davis Brinson, Kenansville;  
19 Doug Grady, Mt. Olive; Dr. Austin Obasohan, Kenansville; Robert  
20 Ross, Beulaville; David Powell, Wilmington; Howard Hobson,  
21 Clinton; Christine Lawson, Raleigh; Gary Saunders, Raleigh;  
22 Zettie Williams, Magnolia, North Carolina; Dr. Lawrence Rouse,  
23 Kenansville; Mark Williams, Raleigh; Everett Murphrey,  
24 Farmville, North Carolina; Catherine Flowers, Raleigh; Michael  
25 Flowers, Raleigh; Oscar Ellis, Beulaville; Kevin Ellis,

## CORRECTED EXHIBIT 3

1 Beulaville; Thelma Ellis, Beulaville and Corey Robinson,  
2 Dolores, Colorado.

3           You know some of those names I read more than once  
4 and that's because they are both plaintiffs' and defendant's.  
5 Some of them have the same witnesses listed.

6           Now, if you know any of those witnesses you need to  
7 check yes for question five so you can talk to me about that.

8           Number six: Have you had any business dealings with  
9 or do you know anyone who works or has worked for WH Group  
10 Limited, Smithfield Foods Incorporated, Shuanghui International  
11 Holdings Limited, Murphy-Brown, LLC, Murphy Family Farms,  
12 Murphy Family Ventures, Prestage, Goldsboro Mills, Browns of  
13 North Carolina, Premium Standard Farms or Carroll's Foods.

14           Question seven: Have you or do you own shares of  
15 stock in Murphy-Brown, Smithfield Foods, Inc., WH Group  
16 Limited, Shuanghui International Holdings Limited?

17           Have you ever lived on or been employed by a large  
18 farm?

19           Number nine: Do you know anyone who has? Of course  
20 that refers back to eight.

21           Number ten: Do you have any negative opinions about  
22 lawyers, hog farming operations that would interfere with your  
23 ability to be a fair and an impartial juror in a trial of this  
24 action?

25           Number 11: Have you or your family or close personal



## CORRECTED EXHIBIT 3

1 friends had any association with the National Pork Producers  
2 Council, the National Pork Board, the North Carolina Pork  
3 Council or other similar organization.

4           Number 12: Are you a vegan or vegetarian?

5           Number 13: Do you belong to or contribute to PETA,  
6 which is People for the Ethical Treatment of Animals, or any  
7 other adversary groups like Sierra Club, River Keepers, the  
8 Natural Resources Defense Council, the North Carolina  
9 Environmental Justice Network, Rural Empowerment Association,  
10 Forbe Community Health, Southern Environmental Law Center or  
11 Water Keeper Alliance?

12           Number 14: Do you feel that you cannot listen to the  
13 evidence and my instruction on the law and deliberate in good  
14 faith?

15           Number 15: Do you know of any reason that you can't  
16 be fair and impartial?

17           Contemplate your answers there for a moment. Make  
18 sure you check if you need to tell me about them.

19           I have a hand raised there.

20           PROSPECTIVE JUROR: Can we ask for a bathroom break?

21           THE COURT: All right. Let's take a 15-minute  
22 recess. Everybody come back right where you are.

23           (The proceedings were recessed at 11:15 a.m. and reconvened  
24 at 11:30 a.m.)

25           THE COURT: All right. Got somebody ready with the

1 microphone? Let me ask you, anybody on the first row who  
2 answered any question yes, checked any question? All right.  
3 Pass the mic down to the lady.

4 PROSPECTIVE JUROR: My name is [REDACTED]. I  
5 heard of things like this on the news on and off. I don't know  
6 if it's specifically these plaintiffs, but I'm aware that  
7 there's been complaints about the odors.

8 THE COURT: Based on what you've heard from whatever  
9 source, did you discuss the matter with anyone?

10 PROSPECTIVE JUROR: No, sir.

11 THE COURT: Did you form or express any opinion about  
12 the merits or demerits of the case?

13 PROSPECTIVE JUROR: Well, I feel for the people who  
14 have to live around those odors, but I also respect that an  
15 industry has a right to run a business, so...

16 THE COURT: Well, do you feel that based on what  
17 you've heard, that you would have any difficulty being a fair  
18 and impartial juror, listening to the evidence as it comes from  
19 the witness stand, listening to the law as I define it for you,  
20 and rendering your verdict based solely on that?

21 PROSPECTIVE JUROR: No, sir, I don't think so.

22 THE COURT: Did you answer any other question?

23 PROSPECTIVE JUROR: As yes? No, sir.

24 THE COURT: Pass the mic down to somebody else I  
25 believe raised their hand.

1 PROSPECTIVE JUROR: I also heard about the case on  
2 the news; but no, it would not interfere with my choice or  
3 decision.

4 THE COURT: Let me ask you another question, too.  
5 State your name, if you will.

6 PROSPECTIVE JUROR: [REDACTED].

7 THE COURT: Was it from the news media?

8 PROSPECTIVE JUROR: Yes, sir.

9 THE COURT: After hearing whatever you heard, did you  
10 discuss the matter with anyone?

11 PROSPECTIVE JUROR: No, sir.

12 THE COURT: Did you form any opinion about it?

13 PROSPECTIVE JUROR: No, sir.

14 THE COURT: And I believe you already said you feel  
15 that it would not interfere with your ability to be a fair and  
16 impartial juror.

17 PROSPECTIVE JUROR: That's correct.

18 THE COURT: Did you answer any other question on the  
19 sheet?

20 PROSPECTIVE JUROR: No, sir.

21 THE COURT: Thank you, ma'am.

22 PROSPECTIVE JUROR: Thank you.

23 THE COURT: Second row. Anybody on the second row?  
24 State your name, sir.

25 PROSPECTIVE JUROR: [REDACTED].

1 THE COURT: Mr. [REDACTED], which one did you answer?

2 PROSPECTIVE JUROR: The same as the other two, the  
3 question.

4 THE COURT: Where did you obtain your information?

5 PROSPECTIVE JUROR: Reading online about cases  
6 that -- that the cases exist.

7 THE COURT: All right. And after you gained that  
8 information, did you discuss the matter with anyone?

9 PROSPECTIVE JUROR: No, sir.

10 THE COURT: Did you form any opinion about it?

11 PROSPECTIVE JUROR: No, sir.

12 THE COURT: Do you feel that whatever you heard would  
13 interfere with your ability to be a fair and impartial juror if  
14 you're selected?

15 PROSPECTIVE JUROR: No, sir.

16 THE COURT: Pass the mic down unless you got another  
17 one.

18 PROSPECTIVE JUROR: [REDACTED]. I also answered  
19 number one yes for the same reason, just the news media  
20 coverage.

21 THE COURT: I got to ask you these same questions.  
22 After you obtained whatever knowledge you obtained, did you  
23 discuss the matter with anyone?

24 PROSPECTIVE JUROR: Just my spouse, Your Honor.

25 THE COURT: Okay. And did you form or express any

1 opinion about it with regard to --

2 PROSPECTIVE JUROR: I probably did, but it was only  
3 based on the information I heard on the news.

4 THE COURT: Do you feel that anything that you may  
5 have heard on the news created an impression on your part that  
6 you feel that it would take some evidence on behalf of the  
7 other party to remove?

8 PROSPECTIVE JUROR: No, sir.

9 THE COURT: Do you know of any reason why you feel  
10 you couldn't be fair and impartial?

11 PROSPECTIVE JUROR: No, I do not.

12 THE COURT: Is that the only question you answered?

13 PROSPECTIVE JUROR: Yes, sir.

14 THE COURT: Pass the mic down, please.

15 I believe the next one is the gentleman I met on the  
16 elevator this morning.

17 PROSPECTIVE JUROR: Yes, sir.

18 THE COURT: What is your name?

19 PROSPECTIVE JUROR: [REDACTED].

20 THE COURT: Mr. [REDACTED], which one did you check?

21 PROSPECTIVE JUROR: Number four and number six. In a  
22 previous employment I was sales manager for Ford Clinton and we  
23 sold fleet vehicles to Murphy Brown and Prestage Farms.

24 THE COURT: Number six, you had business dealings?

25 PROSPECTIVE JUROR: Yes, sir.

## CORRECTED EXHIBIT 3

1 THE COURT: Do you feel that this past experience  
2 would in any way interfere with your ability to be a fair and  
3 impartial juror in a trial of this case?

4 PROSPECTIVE JUROR: I don't believe so, sir.

5 THE COURT: Living where you were, were you familiar  
6 with large hog farm operations?

7 PROSPECTIVE JUROR: Yes, sir, familiar with them  
8 because we did a lot of business with the area farmers.

9 THE COURT: Okay.

10 PROSPECTIVE JUROR: Yes, sir.

11 THE COURT: But you don't think any information you  
12 may have gained would in any way interfere with your ability to  
13 be fair and impartial?

14 PROSPECTIVE JUROR: I don't believe so, no, sir.

15 THE COURT: Do you know anything that would keep you  
16 from being fair and impartial if you're selected?

17 PROSPECTIVE JUROR: No, sir.

18 THE COURT: Anybody on the next row?

19 PROSPECTIVE JUROR: [REDACTED] and I answered yes  
20 to question number one, I heard it on the media.

21 THE COURT: And after hearing whatever you heard from  
22 the media, did you discuss the matter with anyone?

23 PROSPECTIVE JUROR: I believe I discussed it with my  
24 husband at the time and my question to myself was which came  
25 first, the chicken or the egg? But once the story ended, I

## CORRECTED EXHIBIT 3

1 moved on, didn't think about it again.

2 THE COURT: Did you feel like you have formed any  
3 opinion on the matter as a result of what you heard?

4 PROSPECTIVE JUROR: No, I have not.

5 THE COURT: Do you know -- do you feel that it,  
6 whatever you heard, would in any way interfere with your  
7 ability to be fair and impartial in a trial of this case?

8 PROSPECTIVE JUROR: No, it would not.

9 THE COURT: Did you answer any other question?

10 PROSPECTIVE JUROR: No, I did not.

11 THE COURT: You may pass the mic down to the next  
12 one, whoever, if there is another one. Anybody else on that  
13 row?

14 PROSPECTIVE JUROR: [REDACTED]. I answered yes to  
15 four, five and nine.

16 THE COURT: Okay. Four, five and nine. All right.  
17 Four, tell me about your knowledge, just heard about them or do  
18 you know more about them?

19 PROSPECTIVE JUROR: I work for a parent company and  
20 we deal with a lot of farmers.

21 THE COURT: And so you're familiar with Murphy-Brown?

22 PROSPECTIVE JUROR: Yeah.

23 THE COURT: All right. Who among the witnesses did  
24 you know?

25 PROSPECTIVE JUROR: Tom Butler.

1 THE COURT: And how do you know Mr. Butler?

2 PROSPECTIVE JUROR: He lives on our system, he's got  
3 a microgrid on his farm, I've done a lot of work on his farm,  
4 sent crews to his farm, know him personally.

5 THE COURT: You know him personally?

6 PROSPECTIVE JUROR: Yes.

7 THE COURT: Do you feel that your knowledge of  
8 Mr. Butler would cause you to place greater weight or  
9 credibility on his testimony or lesser weight or credibility on  
10 his testimony than you would on the testimony of some witness  
11 you did not know?

12 PROSPECTIVE JUROR: No, I would believe him.

13 THE COURT: You would believe him?

14 PROSPECTIVE JUROR: Sure.

15 THE COURT: So you feel like it would -- whatever he  
16 said about it, you'd be inclined to believe?

17 PROSPECTIVE JUROR: I would believe that he was  
18 telling the truth.

19 THE COURT: Yeah, okay. I believe I'm going to  
20 excuse you, sir. You may step aside. Thank you very much.

21 All right.

22 PROSPECTIVE JUROR: It's [REDACTED].

23 THE COURT: I see you there.

24 PROSPECTIVE JUROR: I did answer yes to one, four,  
25 six and 13.



1 THE COURT: One, you heard something about it in the  
2 media?

3 PROSPECTIVE JUROR: Yes, probably radio and read it  
4 right in the paper.

5 THE COURT: And based on what you may have --  
6 whatever knowledge you gained by whatever media source, did you  
7 discuss the matter with anyone?

8 PROSPECTIVE JUROR: No, no, sir.

9 THE COURT: Did you form any opinion about the  
10 matter?

11 PROSPECTIVE JUROR: I may have -- nothing lasting,  
12 no, no, sir.

13 THE COURT: Okay. And what else -- well, based on  
14 whatever you may have heard in the media, do you feel that it  
15 created in your mind an impression that would take some  
16 evidence on behalf of the other side to remove?

17 PROSPECTIVE JUROR: No, sir.

18 THE COURT: Now, which -- what's the next one you --  
19 number four?

20 PROSPECTIVE JUROR: Number four.

21 THE COURT: Tell me about your knowledge of  
22 Murphy-Brown.

23 PROSPECTIVE JUROR: I work for Cargill and they're  
24 both a purchaser of soybeans from Murphy-Brown and they sell  
25 meal to Murphy-Brown.

## CORRECTED EXHIBIT 3

1 THE COURT: All right. So do you feel that  
2 experience would in any way affect your ability to be fair and  
3 impartial in a trial of this case?

4 PROSPECTIVE JUROR: No.

5 THE COURT: And six I believe you said.

6 PROSPECTIVE JUROR: Yeah. Six. I'm not -- I'm a  
7 production manager at Cargill's facility, but I do work in  
8 parallel with people that enter into contracts with several of  
9 those companies.

10 THE COURT: Okay. And do you feel that that  
11 experience would in any way cause you to find it difficult to  
12 be fair and impartial in a trial of this case?

13 PROSPECTIVE JUROR: No, sir, I think I could be fair.

14 THE COURT: And the final one was 13?

15 PROSPECTIVE JUROR: Yes, sir. I'm a member of the  
16 Sierra Club.

17 THE COURT: All right, sir.

18 Do you feel like your membership in that club has  
19 affected your way of thinking to the extent that it would  
20 interfere with your ability to be fair and impartial in the  
21 trial of this case?

22 PROSPECTIVE JUROR: No, sir. I could just listen to  
23 the law.

24 THE COURT: Do you know any reason -- number 15, you  
25 didn't check that one, I take it?

1 PROSPECTIVE JUROR: I said no.

2 THE COURT: You may pass it to whoever else.

3 PROSPECTIVE JUROR: [REDACTED]. I answered yes to  
4 one, four, and nine and 14.

5 THE COURT: And how did you -- you answered number  
6 14, you feel you cannot listen to the evidence and be fair and  
7 impartial?

8 PROSPECTIVE JUROR: I'm sorry. I misunderstood. I  
9 thought I'd be fair.

10 THE COURT: So let's go back then and go in order.  
11 You say you checked one?

12 PROSPECTIVE JUROR: Yes.

13 THE COURT: Was the information you gained through  
14 the news media?

15 PROSPECTIVE JUROR: Yes.

16 THE COURT: And after gaining whatever knowledge you  
17 did gain, did you form any opinion about the matter with any  
18 one side or the other?

19 PROSPECTIVE JUROR: Not really.

20 THE COURT: Did you discuss the matter with anyone?

21 PROSPECTIVE JUROR: No.

22 THE COURT: You said you heard of Murphy-Brown?

23 PROSPECTIVE JUROR: Yeah. I'm assuming that's  
24 Wendell Murphy, part of the Murphy that -- I'm going to assume.

25 THE COURT: I think it's a fair assumption. The

## CORRECTED EXHIBIT 3

1 Murphy name as used in this case, and it's several places down  
2 in number six, derive from Mr. Wendell Murphy. I think  
3 everyone will agree to that.

4 Do you know him personally?

5 PROSPECTIVE JUROR: No, sir.

6 THE COURT: Is it just the fact you heard the name  
7 Murphy-Brown and others in the news media?

8 PROSPECTIVE JUROR: Just over the years being a  
9 benefactor for NC State, owned rights to PNC, you know, naming  
10 rights and things like that.

11 THE COURT: What else have you answered?

12 PROSPECTIVE JUROR: Number nine.

13 THE COURT: All right. You know someone who lived on  
14 or been employed by a large hog farm?

15 PROSPECTIVE JUROR: Just not those farms, but I do  
16 know one of the guys, I do work for his family, has a farm in  
17 Belvedere, you know, hog farm and chicken farm in Belvedere.

18 THE COURT: In Belvedere?

19 PROSPECTIVE JUROR: Yes, sir.

20 THE COURT: Do you know what kind of production they  
21 have?

22 PROSPECTIVE JUROR: They do chickens and hogs. I've  
23 never been out there to see it.

24 THE COURT: Do you feel that that friendship you have  
25 with whoever that gentleman is along or in combining with the

## CORRECTED EXHIBIT 3

1 other things that you have cited here, your knowledge about  
2 Mr. Murphy and heard about the case, would in any way interfere  
3 with your ability to be fair and impartial?

4 PROSPECTIVE JUROR: I don't believe so, sir. I think  
5 I'll be fair.

6 THE COURT: How about the next row?

7 PROSPECTIVE JUROR: One and nine.

8 THE COURT: Your name?

9 PROSPECTIVE JUROR: [REDACTED]. I don't know  
10 anything about this particular case, but when I lived in Las  
11 Vegas there was a large case very similar to this.

12 THE COURT: Did you gain whatever knowledge you knew  
13 about the Las Vegas thing from what you read in the news media?

14 PROSPECTIVE JUROR: Yes.

15 THE COURT: Any other sources?

16 PROSPECTIVE JUROR: No.

17 THE COURT: After receiving any knowledge you did  
18 about that matter, did you form or express any opinion about  
19 the merits of either side of the case?

20 PROSPECTIVE JUROR: Yes, with my wife and sister and  
21 her husband.

22 THE COURT: Did you form any opinion as a result of  
23 what you read that you think that would take some evidence or  
24 convincing on the part of the other side to remove?

25 PROSPECTIVE JUROR: Well, my sister and her

1 husband -- I'm from Minnesota originally and they own a large  
2 hog farm in Minnesota, so I talked to both of them about the  
3 case in Las Vegas.

4 THE COURT: Do you feel all of that would interfere  
5 with your ability to be fair and impartial in a trial of this  
6 case? Be candid with yourself.

7 PROSPECTIVE JUROR: Possibly, yeah.

8 THE COURT: You may be excused.

9 PROSPECTIVE JUROR: My name is [REDACTED]. I  
10 said yes to number six.

11 THE COURT: Tell me about that.

12 PROSPECTIVE JUROR: I have a coworker that owns a hog  
13 farm. I believe his last name is on that sheet, Prestage. We  
14 really don't discuss it at work, but he does own a hog farm.

15 THE COURT: Okay. Is that coworker listed as a  
16 witness in this case?

17 PROSPECTIVE JUROR: I don't know if he was or not.  
18 Prestage, Robert, goes by Bob Prestage at work.

19 THE COURT: Where do you work?

20 PROSPECTIVE JUROR: I work at American Airlines.

21 THE COURT: Okay. Do you feel that your knowledge of  
22 him would in any way have any impact on your feelings about  
23 this case separate and apart from any evidence you may hear?

24 PROSPECTIVE JUROR: No, sir, we don't discuss it at  
25 work. I just knew he owned one.

## CORRECTED EXHIBIT 3

1 THE COURT: Was that the only one you checked?

2 PROSPECTIVE JUROR: Yes, sir, number six.

3 THE COURT: Do you feel that would in any way affect  
4 your ability to be fair and impartial?

5 PROSPECTIVE JUROR: No, sir, I would be fair.

6 THE COURT: Thank you, ma'am. You may have a seat.  
7 Pass it on down.

8 PROSPECTIVE JUROR: [REDACTED]. I answered yes to  
9 number one.

10 THE COURT: Did you gain your knowledge through the  
11 news media?

12 PROSPECTIVE JUROR: Yes, sir.

13 THE COURT: And after gaining whatever knowledge you  
14 did, did you form or express any opinion about the matter?

15 PROSPECTIVE JUROR: Yes, sir.

16 THE COURT: Did whatever opinion you arrived at, was  
17 it sufficient that it would require some evidence or convincing  
18 on behalf of the other side to change your mind on it?

19 PROSPECTIVE JUROR: Yes, sir.

20 THE COURT: I take it then that you feel you couldn't  
21 be fair and impartial?

22 PROSPECTIVE JUROR: I wouldn't say that, but based on  
23 the information that was presented in the articles I've read,  
24 I've formed an opinion knowing that it's based on the  
25 information that was available.

## CORRECTED EXHIBIT 3

1 THE COURT: All right. You may step aside. Thank  
2 you, ma'am. Thank you for your candor.

3 Anyone else in that row?

4 PROSPECTIVE JUROR: I'm [REDACTED]. I answered yes  
5 to one, five, six, nine and 13.

6 THE COURT: Number one, was your knowledge derived  
7 from the news media?

8 PROSPECTIVE JUROR: Yes.

9 THE COURT: After gaining whatever knowledge that you  
10 gathered there, did you form an opinion about the merits of the  
11 matter?

12 PROSPECTIVE JUROR: No, I only read one article.

13 THE COURT: Did you discuss the matter with anyone?

14 PROSPECTIVE JUROR: My husband. We read the news  
15 together.

16 THE COURT: You do? Good.

17 PROSPECTIVE JUROR: Like I'm sitting on the couch  
18 reading, I found this interesting thing and he does the same  
19 thing.

20 THE COURT: That's great.

21 I hope that didn't convey anything that I think there  
22 is anything wrong with that. I think it's wonderful.

23 You feel as a result of anything you may have read  
24 there that it would interfere with your ability to be fair and  
25 impartial?



1 PROSPECTIVE JUROR: No.

2 THE COURT: What was the next number?

3 PROSPECTIVE JUROR: Five.

4 THE COURT: Who do you know?

5 PROSPECTIVE JUROR: Dr. Ramsey, is he based out of  
6 Greenville, ECU Physicians, an older gentleman, rheumatologist?  
7 He was a doctor of mine.

8 THE COURT: Do you feel that you would be inclined to  
9 give the testimony of that, Dr. Ramsey, any greater weight or  
10 credibility or lesser weight or credibility than you would any  
11 other witness?

12 PROSPECTIVE JUROR: No. I've had so many  
13 rheumatologists.

14 THE COURT: Okay. What was the next one?

15 PROSPECTIVE JUROR: Six.

16 THE COURT: Which among those?

17 PROSPECTIVE JUROR: I know people. I grew up in  
18 Johnston County. I grew up actually right near the big  
19 distribution plant that Smithfield has, and I've had a friend  
20 who was a hog farmer, or his parents were, growing up and they  
21 worked with Smithfield.

22 THE COURT: Okay. Do you -- all right. What other  
23 did you check yes?

24 PROSPECTIVE JUROR: Do I know anyone who has worked  
25 or owned a large hog farm? Yes.

1 THE COURT: Anybody else --

2 PROSPECTIVE JUROR: They were actually in Chinguapin  
3 in Duplin County. They don't own it anymore. They do chickens  
4 and hogs, Rockey and Joan Mugley, their son Dustin is my best  
5 friend.

6 THE COURT: Okay. Did you answer any others yes?

7 PROSPECTIVE JUROR: Thirteen. I belong to PETA.

8 THE COURT: Okay. Now, do you think that any of the  
9 factors which you have indicated, the yeses to the questions,  
10 standing alone or in combination with each other, would in any  
11 way impair your ability to be fair and impartial?

12 PROSPECTIVE JUROR: Possibly.

13 THE COURT: You may step aside.

14 Anyone else on that row?

15 PROSPECTIVE JUROR: [REDACTED]. I checked one,  
16 four, five and six.

17 THE COURT: Tell me about four. Did you learn about  
18 the matter through the news media?

19 PROSPECTIVE JUROR: Partly. I'm an environmental  
20 engineer and in the environmental consulting business so just  
21 aware of environmental issues in our state.

22 THE COURT: Okay. And did you read -- have you read  
23 media reports about the case or cases?

24 PROSPECTIVE JUROR: No, not particularly this case,  
25 just environmental operations in the state.

1 THE COURT: All right. Have you formed or expressed  
2 any opinion about the matter?

3 PROSPECTIVE JUROR: No, I have not.

4 THE COURT: What other question did you say you --

5 PROSPECTIVE JUROR: Number four, I've heard of  
6 Murphy-Brown; and number five, I think you listed Richard  
7 Shiver as a witness, if he's with the Department of  
8 Environmental Quality, if that's the same person, I just know  
9 of him being in the business.

10 THE COURT: Is that the only witness?

11 PROSPECTIVE JUROR: Yes.

12 THE COURT: Let me ask you, do you feel that the fact  
13 that he -- you know him and where he works would cause you to  
14 give his testimony any greater weight or credibility or lesser  
15 weight or credibility than that of any other witness?

16 PROSPECTIVE JUROR: No, it would not impact me, sir.

17 THE COURT: And what other did you answer?

18 PROSPECTIVE JUROR: Just number six, my engineering  
19 firm. I worked with Murphy Farms -- I've been with the firm 13  
20 years, so probably 12 or 13, before I came to the firm, I  
21 didn't work directly with the people at the farm, didn't know  
22 what they were working on, but my firm did work with Murphy  
23 Farms.

24 THE COURT: Okay. Let me ask you: What is your  
25 firm?

1 PROSPECTIVE JUROR: It's S&ME Engineering here in  
2 Raleigh.

3 THE COURT: How long have you been there?

4 PROSPECTIVE JUROR: Thirteen years.

5 THE COURT: Did you check any other --

6 PROSPECTIVE JUROR: No. Just one, four, five and  
7 six.

8 THE COURT: Okay. Would any of the things that you  
9 told me in and of itself or in combination, do you feel any of  
10 that would interfere with your ability to be a fair and  
11 impartial juror?

12 PROSPECTIVE JUROR: No, sir, I would be fair.

13 THE COURT: Okay. You may have a seat and pass the  
14 mic on to someone else.

15 PROSPECTIVE JUROR: [REDACTED], Your Honor. I just  
16 checked off number one.

17 THE COURT: Tell me, did you gain knowledge off the  
18 news media?

19 PROSPECTIVE JUROR: Just the news media, yes, sir.

20 THE COURT: After gaining whatever knowledge you  
21 gained, did you discuss the matter with anyone?

22 PROSPECTIVE JUROR: No, sir.

23 THE COURT: Did you form or express any opinion about  
24 the matter?

25 PROSPECTIVE JUROR: No, sir.

## CORRECTED EXHIBIT 3

1 THE COURT: Do you feel that whatever you learned  
2 would in any way impair your ability to be fair and impartial  
3 in a trial of this case?

4 PROSPECTIVE JUROR: No, sir.

5 THE COURT: You may have a seat.

6 Pass it on to someone else. Are we on the last row,  
7 now?

8 PROSPECTIVE JUROR: My name is [REDACTED], and I  
9 have a possibility of two and five.

10 THE COURT: Two, which attorney do you think you may  
11 know?

12 PROSPECTIVE JUROR: I don't know her personally, but  
13 depending on how she spells her last name and where her family  
14 is from, we might be related.

15 THE COURT: Who is that?

16 PROSPECTIVE JUROR: Mattix.

17 THE COURT: Which other one?

18 PROSPECTIVE JUROR: It was a witness that last name  
19 was Mattix also.

20 MS. MALLETT: My last name is Mallette, not Mattix.

21 PROSPECTIVE JUROR: I'm sorry. I thought you talked  
22 about --

23 THE COURT: M-A-D-D-I-X?

24 PROSPECTIVE JUROR: No, M-A-T-T-I-X.

25 THE COURT: She spells her name M-A-L-L-E-T-T-E.

1 PROSPECTIVE JUROR: Maybe that was one of the  
2 witnesses you stated was the last name Mattix, but I don't know  
3 how to spell it.

4 THE COURT: Anybody familiar with the witness I may  
5 have read?

6 MR. KAESKE: That name, I believe has -- the witness  
7 has two Ds.

8 THE COURT: M-A-D-D-O-X?

9 MR. KAESKE: Yes, sir.

10 THE COURT: M-A-D-D-O-X.

11 PROSPECTIVE JUROR: It's not a problem if it's not  
12 spelled that way.

13 THE COURT: So you think you can be fair and  
14 impartial?

15 PROSPECTIVE JUROR: Yes.

16 THE COURT: Thank you, ma'am. You may have a seat.

17 PROSPECTIVE JUROR: My name is [REDACTED].  
18 Mine was number one.

19 THE COURT: Did you gain your knowledge through the  
20 news media?

21 PROSPECTIVE JUROR: Not really. I just saw like an  
22 article scrolling through the paper.

23 THE COURT: All right. However you learned it and  
24 whatever you learned, did you form or express any opinion about  
25 the merits of the matter?

1 PROSPECTIVE JUROR: No, sir.

2 THE COURT: Is that the only one you would have  
3 checked?

4 PROSPECTIVE JUROR: Yes, sir.

5 THE COURT: Is there anything about whatever you --  
6 knowledge you gained, do you think it would interfere in any  
7 way with your ability to be fair and impartial in a trial of  
8 this case?

9 PROSPECTIVE JUROR: No, sir.

10 THE COURT: You may pass it on to the next one.  
11 Anybody else?

12 PROSPECTIVE JUROR: [REDACTED], and I checked one  
13 and ten.

14 THE COURT: All right. One is did you gain that  
15 through your -- you checked number ten?

16 PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: I'm not even getting into it. Excuse  
18 you.

19 PROSPECTIVE JUROR: I'm sorry?

20 THE COURT: I'm going to let you step aside. I'm  
21 going to let you step aside.

22 PROSPECTIVE JUROR: My name is [REDACTED]. I  
23 answered one and ten, half of only because I lived a short  
24 distance from a hog farm for awhile.

25 THE COURT: Just a minute, don't get into it. But

1 you checked ten "yes?"

2 PROSPECTIVE JUROR: Yes.

3 THE COURT: You may go as well.

4 Anybody on that last row?

5 (No hands raised.)

6 THE COURT: Okay. Is that everybody that wants to be  
7 heard?

8 (No hands raised.)

9 THE COURT: Counsel, I can well imagine that some of  
10 the questions or comments the jurors made might generate  
11 questions on your part. So if they make it to the next round  
12 if you will write that out or approach the bench to discuss  
13 that. I can imagine that either way I might expect it.

14 Members of the jury, while you're here during this  
15 case you will no doubt have questions that you want answered,  
16 particularly about schedule or where the bathroom is or  
17 anything of that nature that don't relate to the case itself.  
18 There are a lot of people around that can answer those  
19 questions for you. I already introduced Lauren Herrmann, my  
20 courtroom deputy. Sitting to the left of me is Amy Condon,  
21 she's the court reporter. Over here is Amy Petty and Melissa  
22 Morgans and Eric Steber, who are all part of my staff, and  
23 Mr. Bruce Holt, he's a court security officer. And you will  
24 see others that are dressed similarly to Mr. Holt. So any time  
25 during the trial, if you have any question you want answered,



1 lagoons.

2 THE COURT: Okay. There will be issues of  
3 environmental engineering and technical feasibility. These  
4 issues must be decided based only on the evidence presented at  
5 the trial and not your personal expertise or experience. Do  
6 you think it will be difficult for you to do that?

7 PROSPECTIVE JUROR: Yes, I can do that.

8 THE COURT: The way I asked the question was: Do you  
9 think it would be difficult for you to do that?

10 PROSPECTIVE JUROR: No, no, no. I can be fair and  
11 impartial.

12 THE COURT: All right. Your firm has been hired both  
13 by the defendant and this law firm to consult in environmental  
14 issues, would you be uncomfortable rendering a verdict against  
15 them?

16 PROSPECTIVE JUROR: No, I would not.

17 THE COURT: Okay. Thank you very much.

18 MR. KAESKE: Your Honor, would I be able to follow up  
19 with Ms. [REDACTED]?

20 THE COURT: No. You can approach the bench.

21 MR. KAESKE: Thank you, Your Honor.

22 (Bench conference held off the record.)

23 THE COURT: Ms. [REDACTED], let me ask you again. You  
24 have expressed some sympathies for people living near a hog  
25 farm. Do you feel that in spite of those feelings that you can

## CORRECTED EXHIBIT 3

1 be fair and impartial in the trial in this case, rendering your  
2 verdict based solely on the evidence that comes from the  
3 witness stand and my instructions to you on the law?

4 PROSPECTIVE JUROR: Yes, sir, I think so, yes, sir.

5 THE COURT: All right. Thank you.

6 (Bench conference held on the record.)

7 THE COURT: The defendant makes --

8 MR. ANDERSON: Murphy-Brown challenges the juror for  
9 cause. She disclosed in the first question and again that she  
10 comes to court with information she learned --

11 MR. KAESKE: I'm just saying if she said she can be  
12 fair, if that's the standard, then I think they need to use a  
13 strike on her.

14 THE COURT: I haven't made up my mind.

15 MR. KAESKE: Yes, sir. That's what I would say. I  
16 think she says she can be fair. Everybody has ideas.

17 (Bench conference concluded.)

18 THE COURT: We'll seat another juror.

19 Ms. [REDACTED], we're going to let you step aside.  
20 Thank you very much for coming and making yourself available  
21 for jury service.

22 Madam Clerk, call an additional juror.

23 THE CLERK: [REDACTED].

24 THE COURT: Mr. [REDACTED], do you have your cheat sheet?

25 PROSPECTIVE JUROR: Yes, sir.

1 took offense at me telling a witness to answer the question. I  
2 really don't see how you found anything offensive about that,  
3 but if you did, the Fourth Circuit can say so.

4 I commend you on standing up for what you believe in  
5 and arguing with me and -- but by the same token, I've got to  
6 tell you that I think you're getting close to the edge.

7 MR. ANDERSON: Yes, sir. With all due respect, I  
8 have a great deal of respect for the judicial system and for  
9 the jury process, trying to do everything I can, as I'm sure  
10 the Court is, to see to a fair trial.

11 If I could have a moment because based on what the  
12 Court has done, I --

13 THE COURT: You can have as much time as you want.

14 MR. ANDERSON: Thank you.

15 (Pause in the proceeding.)

16 THE COURT: Mr. Anderson, you ready?

17 MR. ANDERSON: Yes, Your Honor. Let me make sure I  
18 have the right juror number. Your Honor, we would strike juror  
19 number 14, Mr. [REDACTED].

20 THE COURT: All right. I'm going to call the ones  
21 that I think have survived my rulings and the challenges by the  
22 parties, and I'm doing a lot of this to make sure that the  
23 record reflects it right. So listen carefully.

24 The following jurors will be seated:

25 [REDACTED] -- I'm beginning on the

1 back row. [REDACTED]; [REDACTED];

2 [REDACTED]; [REDACTED].

3 On the second row, middle row: [REDACTED]; [REDACTED]

4 [REDACTED]; [REDACTED]; [REDACTED] and [REDACTED].

5 On the outside row: [REDACTED]; [REDACTED], and

6 [REDACTED].

7 Does anybody challenge the correctness of what I've  
8 stated?

9 MR. KAESKE: No, sir, Your Honor.

10 THE COURT: All I'm asking is if you agree or  
11 disagree that I have correctly recorded what the rulings were,  
12 not that you agree with the rulings.

13 MR. ANDERSON: You read Ms. [REDACTED]; is that correct?

14 THE COURT: I'm sorry?

15 MR. ANDERSON: I think I heard the answer that you  
16 did read out Ms. [REDACTED]'s name?

17 THE COURT: Yes, yes. On the back row: [REDACTED]

18 [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]

19 [REDACTED].

20 On the middle row: [REDACTED]; [REDACTED];

21 [REDACTED]; [REDACTED] and [REDACTED].

22 On the front row: [REDACTED]; [REDACTED] and

23 [REDACTED]. I believe that makes 12.

24 MS. CHECKOVICH: Your Honor, I'd like to note for the  
25 record that we would, once again, request that the Court strike

1 the jury and start over with a new venire or a any alternative  
2 grant in this trial based on the improper grant of a Batson  
3 challenge where the plaintiffs have shown no intentional  
4 discrimination and based on the Court's improper remedy in not  
5 striking the venire and starting over with jury selection.

6 THE COURT: Okay. Motion denied.

7 Can I get an answer out of you whether I correctly  
8 recorded after the rulings?

9 MR. ANDERSON: Yes, I apologize. I asked for  
10 clarification on one juror but to the best of my knowledge you  
11 have.

12 THE COURT: Okay. And Mr. Kaeske, you said you  
13 agreed?

14 MR. KAESKE: Yes, sir.

15 THE COURT: Bring the jury back in.

16 (The prospective jury entered the courtroom at 4:00 p.m.)

17 THE COURT: Members of the jury, I apologize for the  
18 lengthy recess. I assure you that the Court was busy in  
19 talking to counsel about things that I have to decide outside  
20 of your presence.

21 Having arrived at the decisions that the Court was  
22 required to rule on and exercising the challenges that the  
23 parties are entitled by law to have, the following jurors have  
24 been excused from the trial of this case. And when I -- if you  
25 will wait until I have called all names before you get up, and

## **Exhibit 4**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION**

----- )  
WOODELL MCGOWAN, et al., )  
 )  
Plaintiffs, )  
 )  
vs. ) CASE NO. 7:14-CV-182-BR  
 )  
 )  
MURPHY-BROWN, LLC, )  
 )  
Defendant. )  
----- )

**WEDNESDAY, JUNE 13, 2018  
JURY TRIAL  
BEFORE THE HONORABLE W. EARL BRITT  
SENIOR UNITED STATES DISTRICT JUDGE**

REPORTER'S NOTE:

This trial transcript is being provided in rough draft form. Please be aware that there will be discrepancies regarding page and line number when comparing the rough draft and the final certified transcript. Also please be aware that the uncertified rough draft transcript may contain untranslated steno, misspelled proper names, incorrect or missing Q/A symbols or punctuation, and/or nonsensical English word combinations. All such entries will be corrected on the final, certified transcript.

25

1 (Wednesday, June 13, 2018 commencing at 9:27 a.m.)

2 P R O C E E D I N G S

3  
4 (In chambers)

5 REPORTER'S NOTE: PRESENT: Mona Lisa Wallace,  
6 Jocelyn Mallette, Mark Anderson, Mike Kaeske, Tennille  
7 Checkovich, Lauren Herman and Amy Petty.

8 THE COURT: I have called you in here to report to  
9 you some information which I have just obtained and which is  
10 that one of the jurors asked -- happened to bump in to Scott  
11 Cannon who'S the jury administrator this morning and told  
12 Scott that he needed to talk to him. And Scott said, if you  
13 want to talk about procedure, I can talk about that but I  
14 can't talk to you about substance of the case. And so he  
15 said, well, it may get into both. So Scott, before he let  
16 the guy talk at all, called a court security officer over to  
17 be present, at which time the juror, Mr. [REDACTED], number 4 in  
18 the front row, reported that another juror had been going out  
19 and doing research and coming back and reporting to the other  
20 jurors such things as the fact that you are an out of state  
21 attorney, the results of the first trial, the legislation  
22 that has been introduced by the General Assembly. That's  
23 about as far as I got.

24 Of course, I realized at that point it was serious  
25 enough that I needed to do a lot more and my proposed

~ ROUGH DRAFT ~



1 procedure is to ask Mr. [REDACTED] to come back here now before us  
2 and have him to tell us whatever it was he was going to tell  
3 Scott and I would invite your -- well, at some time we need  
4 to go back in the courtroom about it, but I thought at the  
5 outset, that it would be best to do it in here because Mr.  
6 Gaus may be intimidated by us speaking in the big open  
7 courtroom with all the people out there. But at some time I  
8 need to go back in there and make a record.

9 And then I think -- and this has all happened so  
10 fast -- I think I probably need to call the jurors in one by  
11 one to get different versions as to what has happened and  
12 then finally at the end, call in the juror, whoever it might  
13 be, that is supposed to have done this and then, after that,  
14 depending on what's said, looking to me like it probably  
15 means I have no choice but to declare a mistrial, but we'll  
16 see.

17 MR. ANDERSON: Yes.

18 THE COURT: Mr. Kaeske.

19 MR. KAESKE: I would ask that -- obviously I'm  
20 trying to react as quickly as I can. I would ask that we  
21 not -- that we be mindful of the possibility or maybe even  
22 the likelihood that there is not a need for a mistrial and  
23 that we do what we can do to protect the integrity of the  
24 trial that we've got so far to the extent that we can. My  
25 concern would be -- and I don't know the law, I don't know

~ ROUGH DRAFT ~

1 where all the people are out there. And there is only two  
2 lawyers here, the two main lawyers.

3 THE JUROR: Good morning. I didn't see you.

4 MR. ANDERSON: We're not really hiding back here.

5 THE COURT: And Michelle, of course, the court  
6 reporter. Now everything I say has to be on -- and you  
7 say --

8 THE JUROR: Yes, sir.

9 THE COURT: -- has to be on the record. So first  
10 let me ask you, it's been brought to my attention that there  
11 has been some discussion back in the jury room about  
12 information that someone has been receiving on the Internet.  
13 Have you heard any discussion about that?

14 THE JUROR: The only thing I have heard was -- it  
15 was goats -- fainting goats.

16 THE COURT: About what?

17 THE JUROR: Fainting goats. It's a joke about some  
18 goats or whatever that was fainting. Goats that faint when  
19 they are afraid or whatever.

20 THE COURT: Have you heard anybody refer to having  
21 done some research on the Internet and found out anything  
22 about, for example, the lawyers?

23 THE JUROR: I did hear that one of the lawyers was  
24 from Texas or something like that.

25 THE COURT: Okay. And did you hear any other

~ ROUGH DRAFT ~

1 discussion --

2 THE JUROR: Not to my knowledge.

3 THE COURT: -- about what somebody may have found  
4 out on the Internet?

5 THE JUROR: No, I haven't.

6 THE COURT: Nothing about other trials that may  
7 have been conducted --

8 THE JUROR: No, sir. No, I haven't.

9 THE COURT: Nothing about what the North Carolina  
10 legislature may be doing?

11 THE JUROR: No, sir.

12 THE COURT: Okay.

13 THE JUROR: Only that I did hear -- I heard  
14 something about -- something about lawsuits or whatever. I  
15 did hear something about lawsuits and that was, like,  
16 yesterday. Somebody said something about lawsuits, but I  
17 don't know what the details were on that.

18 THE COURT: Have you heard anything in this case  
19 that you feel would make it -- would interfere with your  
20 ability to be fair and impartial in the trial?

21 THE JUROR: No, sir.

22 THE COURT: Nothing you've heard has caused you to  
23 suddenly and somehow favor one side or the other?

24 THE JUROR: No, sir. Not at all.

25 THE COURT: All right. And you wracked your memory

~ ROUGH DRAFT ~

1 now and that's all you can tell me about it?

2 THE JUROR: Yes, sir.

3 THE COURT: All right. I thank you.

4 THE JUROR: You're welcome.

5 THE COURT: I'm going to let you go back and our  
6 clerk will carry you back to the jury room.

7 THE JUROR: Okay.

8 THE COURT: Go through that door there.

9 THE JUROR: Okay. Thank you.

10 (Juror #1 [REDACTED] escorted out of chambers)

11 THE COURT: Just hold up a minute, Lauren.

12 Okay. Mr. Kaeske.

13 MR. KAESKE: Your Honor, I was just going to say,  
14 it seems from what Mr. [REDACTED]

15 MS. HERMANN: [REDACTED].

16 MR. KAESKE: From what Mr. [REDACTED] said, it's  
17 possible -- maybe even likely -- that some or more of the  
18 jurors haven't heard anything. And so I would -- in order to  
19 protect, like I said, what might be the integrity of the jury  
20 going forward with -- or all of the jury that we do it -- the  
21 questioning in such a way that they not be -- it not be  
22 suggested rather than asked whether and what they've heard.  
23 Of course, you need to find out everything, but I just wonder  
24 if there is a way to do it so that they don't know --

25 THE COURT: Well, do you feel that you lawyers

~ ROUGH DRAFT ~

1 Michelle, who's the court reporter -- I have to make a record  
2 of everything -- and the two lawyers who you know back there.

3 MR. ANDERSON: Good morning.

4 THE COURT: And Lauren, of course. And I want you  
5 to relax and know that the only reason I've asked you to come  
6 back here is that I have to assure myself that anything that  
7 goes on in the jury room does not in any way bring any  
8 outside information in that might affect the jury. Having  
9 said that, have you heard any discussion by other jurors  
10 about doing any Internet research about the case or about  
11 individuals or about any other part of it?

12 THE JUROR: Not about the case.

13 THE COURT: Have you heard some of them say  
14 anything about Internet research?

15 THE JUROR: No. I mean, like with dogs, like  
16 animal stuff, not anything related to the case itself.

17 THE COURT: So have you -- okay. And you can't  
18 recall any discussion at all about -- by anybody about  
19 anything about this case or other cases or the legislature or  
20 North Carolina --

21 THE JUROR: Not anybody doing research. I know the  
22 discussion about the bill that may or may not have been  
23 passed, that was ongoing, but not anybody that actually was  
24 researching it or trying to --

25 THE COURT: Tell me more about that.

~ ROUGH DRAFT ~

1           THE JUROR: Just that the bill that was going  
2 through the Senate related to the farm. I don't know the  
3 details myself because I haven't looked, that there was  
4 something like that going on and whether that may or may not  
5 have been passed. I heard some discussion about that but I  
6 wasn't involved in the discussion to know what the results  
7 were. But other than that, not anything that's --

8           THE COURT: You heard any discussion of -- anybody  
9 mention any names of any lawyers?

10          THE JUROR: Huh-uh, no.

11          THE COURT: Well, whatever you've heard, do you  
12 feel that it would in any way impair your ability to be fair  
13 and impartial?

14          THE JUROR: No.

15          THE COURT: All right. I'm going to let you go  
16 back to your jury room and ask if you will to please not  
17 discuss with the other jurors anything that we've said in  
18 here.

19          THE JUROR: Yes.

20          THE COURT: Thank you.

21          THE JUROR: Thank you.

22          (Juror #3 [REDACTED] escorted out of chambers)

23          THE COURT: Maybe I'll stick around a little bit.  
24 Bring in Mr. [REDACTED].

25          (Juror #7 [REDACTED], escorted into chambers)

~ ROUGH DRAFT ~

1 THE COURT: Come in, Mr. [REDACTED].

2 THE JUROR: How are you?

3 THE COURT: I'm fine. How are you this morning?

4 THE JUROR: I'm doing okay.

5 THE COURT: Are you awake?

6 THE JUROR: I am awake. I got caffeine and  
7 everything this morning.

8 THE COURT: Okay. I'm just kidding you. I know  
9 how hard it is to stay awake sometimes.

10 THE JUROR: I don't know how you do it.

11 THE COURT: The reason I've asked you to come back  
12 here -- and you'll notice that there is nobody here except  
13 the court reporter and Lauren and the two main lawyers back  
14 there. You remember them.

15 THE JUROR: Yep.

16 THE COURT: And I just called you back, some things  
17 have come to my attention this morning that's caused me to  
18 feel like I need to question the jurors privately about some  
19 things and the reason -- that's the reason I've asked you  
20 back here. And having said that, have you heard any  
21 discussion by any of the jurors about the results of any  
22 research on the Internet?

23 THE JUROR: No.

24 THE COURT: It's important you be level with me  
25 now.

~ ROUGH DRAFT ~

1           THE JUROR: Right, right, right. I'm trying to  
2 think back. No, not really. Very little discussion -- like  
3 kind of like different things, like, I guess, like small  
4 comments and stuff like that, but nothing like -- as far as  
5 small comments, kind of like coming back from the thing, and  
6 like knee high and stuff like that, like different --

7           THE COURT: About what?

8           THE JUROR: What's that? Like different comments  
9 like as far as minor stuff like in the trial, but nothing  
10 like as far as results or anything like that.

11          THE COURT: You mean there's been discussion about  
12 what somebody has learned on the Internet about that?

13          THE JUROR: What's that? Yeah, like different  
14 things like that, but --

15          THE COURT: Well, let me ask you specifically.  
16 Have you heard any discussion about other trials?

17          THE JUROR: Yeah.

18          THE COURT: Okay. And what did you hear about  
19 other trials?

20          THE JUROR: Well, people were just talking about  
21 different like -- different court cases and stuff like that.  
22 Just different things as far as how different court cases and  
23 things like that go. Trying to think of something specific.  
24 But it just was, like, hey, when I was watching TV and I saw  
25 this and that, as far as court cases.

~ ROUGH DRAFT ~



1 THE COURT: Have you heard any discussion about  
2 the -- anybody naming any of the particular lawyers?

3 THE JUROR: No, no, I haven't. I've heard -- like  
4 me, typically when I'm back there, I'll sit back there -- and  
5 most of the time I go out for lunch, other than the last  
6 two days so -- but other than that, like, I've heard -- like  
7 I said -- let's see, like if I have, I can't really --

8 THE COURT: Have you heard anybody discussing  
9 anything about actions by the North Carolina legislature?

10 THE JUROR: Yes.

11 THE COURT: Tell me about that.

12 THE JUROR: One of the jurors mentioned something  
13 about there is -- the legislature passing like a law or  
14 something or talking about passing a law.

15 THE COURT: Was there anything about what the law  
16 is about?

17 THE JUROR: It was something dealing with --  
18 something dealing with the hogs or something like that,  
19 something dealing with something along those lines. They  
20 didn't get too much in detail or I didn't hear too much of  
21 the detail on it, but they were saying something about -- I  
22 came in on the end of that, but it was something dealing with  
23 some type of law that could affect the case or something  
24 similar along those lines. So I did hear that.

25 THE COURT: Do you remember who you heard

~ ROUGH DRAFT ~

1 discussing it?

2 THE JUROR: That was -- I'm trying to think of his  
3 name. It was -- it was the -- I want to say it was [REDACTED].

4 THE COURT: Mr. [REDACTED], who sits on the back row  
5 next to the end?

6 THE JUROR: Yeah. I want to say it was him --  
7 yeah, I want to say it was him and, I think, [REDACTED] or he was  
8 talking to [REDACTED] or somebody or something along those lines  
9 when I came back from the bathroom or something like that.

10 THE COURT: Okay.

11 THE JUROR: But...

12 THE COURT: Have you heard anything, any discussion  
13 at all that you feel at this time would interfere with your  
14 ability to be fair and impartial --

15 THE JUROR: No.

16 THE COURT: -- and the decisions you're going to  
17 have to make about the case we're trying?

18 THE JUROR: No.

19 THE COURT: Have you got anything else you can tell  
20 me about any discussion among the jurors?

21 THE JUROR: No. I think the biggest thing --  
22 probably the biggest thing I heard was the whole thing as far  
23 as what I just told you as far as that. Other than that,  
24 it's just been kind of the -- where we're going to go for  
25 lunch and stuff like that. Basic stuff. Like I said, the

~ ROUGH DRAFT ~

1 knee high thing, looked that up and some other stuff like  
2 that which was kind of funny. I've never heard of that  
3 before for that -- before that.

4 THE COURT: Okay. I'm going to let you go back to  
5 the jury room and I would ask when you go back you not  
6 discuss what we've discussed.

7 THE JUROR: Okay.

8 THE COURT: Thank you a lot. See you in a little  
9 bit.

10 THE JUROR: Okay.

11 (Juror # 7 [REDACTED] escorted out of  
12 chambers)

13 THE COURT: [REDACTED].

14 MR. ANDERSON: Judge I think one suggestion is they  
15 seem to be taking Internet research pretty literally. It may  
16 help to ask information from outside sources or news media,  
17 make it a little bit broader.

18 THE COURT: Okay.

19 MR. KAESKE: It sounded like when he said --  
20 literally he meant anything. One person said somebody was  
21 talking about research on dogs, somebody else was talking  
22 about the knee high thing. And so maybe my suggestion got  
23 too broad.

24 (Juror #10 [REDACTED] escorted into chambers)

25 THE COURT: Come right in, Ms. [REDACTED].

~ ROUGH DRAFT ~

1 THE JUROR: Good morning.

2 THE COURT: How are you?

3 THE JUROR: Okay.

4 THE COURT: I guess there may be some apprehension  
5 about in the jury room what's going on.

6 THE JUROR: Yes, yes.

7 THE COURT: I can understand that. As you can see  
8 there is nobody here but Michelle and the deputy clerk and  
9 the two main lawyers.

10 THE JUROR: Um-hum.

11 THE COURT: Some things have come to my attention  
12 that's caused me to bring the jurors back here individually  
13 and talk to you about some things. It's important -- of  
14 course you know how important it is -- to be completely  
15 honest about everything so the Court -- I have a duty looking  
16 into things when something comes to my attention.

17 THE JUROR: Um-hum.

18 THE COURT: With that in mind, let me ask you if  
19 you have heard any discussions among the other jurors about  
20 any information they may have gained from sources outside the  
21 courtroom.

22 THE JUROR: No, I haven't heard anything.

23 THE COURT: Is there any -- have you heard anything  
24 about any discussion about other trials?

25 THE JUROR: No, sir.

~ ROUGH DRAFT ~

1 THE COURT: How about any of the lawyers by name?

2 THE JUROR: From other trials you mean?

3 THE COURT: No, any of the lawyers in this case by  
4 name discussing -- other than in -- well, again I'm referring  
5 to outside information or --

6 THE JUROR: No.

7 THE COURT: -- Internet research.

8 THE JUROR: No, sir.

9 THE COURT: Do you remember making the comment that  
10 it's getting difficult to stay impartial because of some of  
11 the things you've heard?

12 THE JUROR: No, sir. I'm open minded this whole  
13 time.

14 THE COURT: Okay. And what about the -- have you  
15 heard anything at all about the actions by the North Carolina  
16 legislature?

17 THE JUROR: No, sir.

18 THE COURT: So you're telling me that as far as you  
19 have observed and heard, there's been no discussion by  
20 anybody about any outside information or Internet research or  
21 things of that nature?

22 THE JUROR: No, sir.

23 THE COURT: Okay. Well, I'm going to let you go on  
24 back to the jury room and when you do, please don't discuss  
25 with the other jurors what you and I may have talked about.

~ ROUGH DRAFT ~

1 THE JUROR: Okay.

2 THE COURT: Thank you.

3 (Juror #10 [REDACTED] escorted out of chambers)

4 THE COURT: [REDACTED].

5 That's a direct conflict.

6 (Juror #12 [REDACTED] escorted into chambers)

7 THE COURT: Good morning, Ms. [REDACTED].

8 THE JUROR: Good morning.

9 THE COURT: How are you this morning?

10 THE JUROR: Fine.

11 THE COURT: I guess there's a little apprehension  
12 back in the jury room as to what's going on.

13 THE JUROR: A little bit.

14 THE COURT: As you can tell, this is sort of a  
15 private conversation. I don't have anybody in here except  
16 the people that absolutely have to be here like the court  
17 reporter --

18 THE JUROR: Okay.

19 THE COURT: -- and the two lawyers sitting back  
20 there. You know them.

21 THE JUROR: Um-hum.

22 THE COURT: And Lauren.

23 THE JUROR: Um-hum.

24 THE COURT: The reason I asked you to come back  
25 here is to discuss with you and follow up on some information

~ ROUGH DRAFT ~

1 talking to feel as at ease as you possibly can when you're  
2 talking to me. And the thing I want to talk to you about is  
3 whether you have gained any information or have you heard  
4 anybody in the courtroom -- in the jury room, any other  
5 jurors, talking about information that they may have obtained  
6 from another source, like something they researched on the  
7 Internet or something of that nature.

8 THE JUROR: I don't really pay any attention to it  
9 but -- not really.

10 THE COURT: Have you heard anybody -- any other  
11 jurors discussing other trials that may have taken place?

12 THE JUROR: Not really. I think somebody said  
13 something about the legislator but not really any trials.

14 THE COURT: Can you recall what you heard?

15 THE JUROR: They said something that they were  
16 working on something about lawsuits and the legislature or  
17 something and I can't remember which one it was. Everybody  
18 is in there talking at the same time.

19 THE COURT: All right. What about the lawyers,  
20 have you heard anybody mention any of the lawyers who are in  
21 this case or any information they might have learned about  
22 the lawyers from outside sources?

23 THE JUROR: No, sir.

24 THE COURT: Okay. Well, it sounds like the only  
25 thing you've heard any discussion on was about the

~ ROUGH DRAFT ~

1     legislation --

2             THE JUROR: I'm not sure what kind of cases -- what  
3     it was that they were talking about exactly but --

4             THE COURT: Well, whatever you heard, has it in any  
5     way impaired your ability to be fair and impartial in the  
6     trial of this case?

7             THE JUROR: No, sir.

8             THE COURT: You don't think it will have any effect  
9     at all?

10            THE JUROR: Not even close.

11            THE COURT: I'm going to let you go back to the  
12     jury room and I would ask when you go back that you not  
13     discuss what we've talked about.

14            THE JUROR: Okay.

15            THE COURT: All right. See you in a little bit.

16            (Juror #5 [REDACTED] escorted out of chambers)

17            THE COURT: [REDACTED].

18            (Juror #9 [REDACTED] escorted into chambers)

19            THE COURT: There is my favorite nurse.

20            THE JUROR: Hi.

21            THE COURT: Hey, Ms. [REDACTED]. How are you?

22            THE JUROR: Okay. How are you?

23            THE COURT: Did you work last night?

24            THE JUROR: No.

25            THE COURT: I saw Ms. [REDACTED] coming in the other

~ ROUGH DRAFT ~



1 morning and -- I guess it was Monday morning -- and you said  
2 you had been working all week.

3 THE JUROR: The weekend, yes, sir.

4 THE COURT: The reason I've asked you to come back  
5 here is I want to discuss with you in just as private a  
6 conversation as we can. I have to have the court reporter  
7 here because I have to take down everything and we just got  
8 the two main lawyers here. You know them and Lauren, of  
9 course.

10 THE JUROR: Um-hum.

11 THE COURT: And it has to concern -- it has to do  
12 with any discussions that you may have had yourself or heard  
13 others having with regard to any information that a juror may  
14 have obtained either through searching the Internet or from  
15 other sources. Have you heard any of that?

16 THE JUROR: I have not, no.

17 THE COURT: Well, let me get into a few specifics.  
18 Have you had any -- have you heard any discussion by other  
19 jurors about any action by the North Carolina legislature?

20 THE JUROR: Not that I recall, no.

21 THE COURT: Have you had any -- do you recall  
22 having any or hearing any discussion about other jurors  
23 having any information with regard to other trials?

24 THE JUROR: No.

25 THE COURT: What about the lawyers who are involved

~ ROUGH DRAFT ~

1 in any way interfere with your ability to be fair and  
2 impartial?

3 THE JUROR: No. Not at all because that's  
4 something else. This is -- it's the first time, you know --  
5 it's new for me.

6 THE COURT: Thank you very much. I want to let  
7 Lauren carry you back to the jury room and I would ask you to  
8 not discuss with your other jurors what you and I have talked  
9 about.

10 THE JUROR: Okay.

11 THE COURT: Okay. Thank you, ma'am.

12 THE JUROR: Yes.

13 (Juror #6 [REDACTED] escorted out of chambers)

14 THE COURT: I guess that's everybody but Mr.

15 [REDACTED].

16 (Juror #11 [REDACTED] escorted into chambers)

17 THE COURT: Good morning, Mr. [REDACTED].

18 THE JUROR: Good morning.

19 THE COURT: How are you, sir?

20 THE JUROR: I'm doing well.

21 THE COURT: I just called you back because I want  
22 to have a little private conversation with you.

23 THE JUROR: Yes, sir.

24 THE COURT: And it's about as private as I can make  
25 it without -- obviously without having it in the courtroom,

~ ROUGH DRAFT ~

1 but I have to have the court reporter here and my courtroom  
2 deputy and the two lawyers are here because I need to report  
3 to them what is happening in here to let them hear it.  
4 That's the only reason.

5 THE JUROR: Understood. Yes, sir.

6 THE COURT: What I need to talk to you about is to  
7 ask you whether you have heard other jurors or have you  
8 yourself discussed things that may have come from a source  
9 outside the courtroom such as from the Internet?

10 THE JUROR: So, no, sir.

11 THE COURT: Have you yourself done any Internet  
12 research?

13 THE JUROR: No, sir.

14 THE COURT: And you haven't discussed with any of  
15 the jurors any of the -- about results of what Internet  
16 research you may have done?

17 THE JUROR: No, sir.

18 THE COURT: Specifically, did you do any research  
19 about the -- any other trials that had been --

20 THE JUROR: No, sir.

21 THE COURT: -- conducted? Did you do any research  
22 about what the North Carolina legislature may be doing with  
23 regard to --

24 THE JUROR: No, sir.

25 THE COURT: Have you heard anyone else have any

~ ROUGH DRAFT ~

1 THE JUROR: That was [REDACTED] and whatever -- I don't  
2 know how to pronounce his last name.

3 THE COURT: Yes. And he's the one that said that  
4 he had heard that Mr. Houston was about to be indicted.

5 THE JUROR: That's what he said.

6 THE COURT: Okay. Did that in any way -- do you  
7 feel that whatever you heard about that would -- Mr. Houston  
8 has not been a witness in the case.

9 THE JUROR: No, he has not. He's just been  
10 referred to in this case.

11 THE COURT: Well, do you feel that that would in  
12 any way impair your ability to be fair and impartial?

13 THE JUROR: I would hope not. I don't know what  
14 Mr. Houston is going to be indicted for. Doesn't seem to be  
15 common knowledge out there except for maybe -- I don't get on  
16 the Internet a lot. I only get on the Internet to pay my  
17 taxes most of the time and e-mail my sister a couple times a  
18 week. I'm pretty illiterate on it.

19 THE COURT: Well, of course, if Mr. Houston is not  
20 a witness, the only thing you heard about him is something  
21 outside the courtroom and your instructions, as I've told you  
22 all along, would be to decide this case based solely on what  
23 you hear inside the courtroom uninfluenced by any other  
24 outside information you may have received. Now, as I  
25 mentioned to you a minute ago, that's something that only you

~ ROUGH DRAFT ~

1 can answer. If --

2 THE JUROR: Correct.

3 THE COURT: -- if you feel it would in any way  
4 affect you, you need to let me know and say so and if not,  
5 say so.

6 THE JUROR: All right. I really still think I  
7 could be impartial. I'm actually -- I wouldn't say totally  
8 enjoying it, but it's quite -- it's been quite the experience  
9 to be part of.

10 THE COURT: Yeah. Okay. Well, again, I appreciate  
11 you bringing this to my attention and I'm going to let you go  
12 on back to the jury room and I would ask you not discuss with  
13 the jurors anything we've talked about.

14 THE JUROR: I will. I've had to tell them five or  
15 ten times, I do not know a thing, already. So thank you.

16 THE COURT: Thank you, sir.

17 (Juror #4 [REDACTED] escorted out of chambers)

18 THE COURT: Would you all like to confer with your  
19 other attorneys and argue the matter in here or you want to  
20 go back and argue it in the courtroom or what's your  
21 feelings?

22 MR. KAESKE: I don't feel a need to argue it in the  
23 courtroom.

24 THE COURT: Mr. Anderson.

25 MR. ANDERSON: I think we should spend some time

~ ROUGH DRAFT ~

1 conferring. I'm happy to --

2 THE COURT: Well, go and talk to your lawyers, your  
3 colleagues, your advisors or make any phone calls you need to  
4 make to whoever, and come back in about 15 minutes and let's  
5 talk again, okay?

6 MR. ANDERSON: Yes, sir.

7 MR. KAESKE: Thank you, sir.

8 (Attorneys Kaeske and Anderson escorted out of chambers)

9 (Brief recess at 11:04 a.m.)

10 (Chambers conference resuming at 11:58 a.m.)

11 REPORTER'S NOTE: PRESENT: Tennile Checkovich,  
12 Mark Anderson, Jocelyn Mallette, Mona Wallace, Mike Kaeske,  
13 Amy Petty, Melissa Morgan, and Lauren Hermann.

14 THE COURT: Okay. Let the record reflect we are  
15 gathered back in the Judge's chambers following an interview  
16 with all the witnesses -- all the jurors with regard to  
17 allegations by one juror that there was some outside  
18 information obtained by at least one or some jurors and the  
19 purpose of gathering back together now is to answer or to get  
20 input from counsel on how we should proceed forward. And the  
21 first thing is should we -- whatever we do, do it in the  
22 Judge's chambers or in the courtroom.

23 Second thing is what should we do. If either of  
24 you have any motions to make, you may make them when you get  
25 the floor. And if you'll address those aspects of the

~ ROUGH DRAFT ~

1 matter, if I have any questions of you, I'll ask you, and  
2 then I'll try to make a decision.

3 Mr. Kaeske.

4 MR. KAESKE: Your Honor, if there is anything to be  
5 said about this, we should say it here on the record. I  
6 don't think there is any point in calling any public  
7 attention. The media is already an issue for the case. We  
8 talked about that last week or the week before, whenever I  
9 asked to come in chambers, and we're obviously dealing with  
10 it again today. I don't think we need to deal with more of  
11 that.

12 And so if there is anything -- if the defendant  
13 wants to make a motion or we need to have motions with  
14 respect to this issue, I think it should be done here. I  
15 don't think it needs to be done publicly.

16 THE COURT: Do you have any motion?

17 MR. KAESKE: I do not.

18 THE COURT: Mr. Anderson.

19 MR. ANDERSON: Your Honor, I think it's -- this is  
20 a serious and unfortunate matter that unfortunately goes to  
21 the integrity of the courts. Obviously we're here -- we will  
22 have a motion. We do have a motion. We have no choice but  
23 to have a motion. I think Ms. Checkovich has been pulling up  
24 the law while I was in here with the court. We had the  
25 unfortunate situation during those interviews -- I think it's

~ ROUGH DRAFT ~

1 clear that there was a lack of candor with the Court on the  
2 part -- the unavoidable conclusion is there was a lack of  
3 candor with the Court on the part of a number of individuals.  
4 I don't see --

5 THE COURT: Are you making a motion --

6 MR. ANDERSON: We do, yes, your Honor.

7 THE COURT: -- for a mistrial?

8 MR. ANDERSON: Yes. Ms. Checkovich is happy to go  
9 through --

10 THE COURT: Do you want to have it heard in here?

11 MR. ANDERSON: I think we're willing to have it  
12 heard in here, yes.

13 THE COURT: Okay. Let me hear you.

14 MS. CHECKOVICH: Yes, your Honor. In determining  
15 whether to grant a mistrial this court should consider the  
16 degree of prejudicial influence possibly resulting from the  
17 information that the jurors have obtained. In making this  
18 determination of jurors' statements on whether they can be  
19 fair and impartial are not determinative. The Court must  
20 conduct an objective analysis considering the probable effect  
21 of the allegedly prejudicial information on the hypothetical  
22 average juror. And what that basically means is you look to  
23 whether the information they have obtained from outside  
24 sources is admissible or not and when it's not and is  
25 prejudicial, then a mistrial is required regardless of

~ ROUGH DRAFT ~



## **Exhibit 5**

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## BUSINESS

# Pork Giant Loses Essential Legal Battle in Manure Case

A federal jury awarded \$25 million to a rural couple in their suit against Smithfield Foods Inc.



Kenneth Sullivan, chief executive of Smithfield Foods Inc., speaks during an interview in Hong Kong, China, in March 2017.

PHOTO: WEI LENG TAY/BLOOMBERG NEWS

By Valerie Bauerlein

June 29, 2018 7:18 p.m. ET

RALEIGH, N.C.—Chinese-owned pork giant Smithfield Foods Inc. lost a pivotal legal battle on Friday, as a federal jury awarded \$25 million to a rural couple for the nuisance caused by living near a Smithfield contractor's hog farm.

The lawsuit is the second in a series of complaints brought by 500 rural North Carolinians who live near Smithfield contractors storing manure in open pools.

Smithfield lost the first case earlier this spring, when a jury in the U.S. District Court for the Eastern District of North Carolina awarded \$50 million to 10 families in Bladen County in the eastern part of the state. That amount was reduced to \$3.25 million to align with state caps on damages.

The earlier case was chosen by plaintiffs' attorneys as their best argument in the bellwether cases setting the tone for the handling of the hundreds of others.

Friday's verdict was a particular blow for Smithfield because the company chose the case as its best chance to convince a jury that its contract farms did not pose a nuisance.

The couple in Friday's verdict, Elvis and Vonnice Williams of rural Duplin County, moved in after the hog farm was established and did not complain to officials before filing their suit, according to court filings.

Representatives of Smithfield and the plaintiffs declined to comment, citing a gag order.



Young hogs at Everette Murphrey Farm in Farmville, N.C., July 2017 PHOTO: GERRY BROOME/ASSOCIATED PRESS

But in a recent interview, Smithfield Chief Executive Ken Sullivan said the lawsuit poses

“an existential threat” to Smithfield’s business in the state. He said abandoning the practice of storing solid waste in open lagoons and spraying liquid waste on farmland, as suggested by the plaintiffs, would undermine Smithfield’s business.

North Carolina produces 8.9 million hogs annually, more than any other state except Iowa. Smithfield owns the vast majority of the hogs produced here, both on company-owned farms and farms run by contractors.

“The verdict is heartbreaking and could have severe and unforeseen economic consequences,” according to the NC Pork Council, a trade group.

Environmentalists cheered the verdict, saying it could force a change in how hog manure is handled here. “In the end, it would be much better for the swine industry to replace all the lagoons and sprayfields so that our state’s rural economy can grow with the new construction activity that lagoon conversion would bring,” said Ryke Longest, professor at Duke University’s law school.

Earlier this week, North Carolina’s legislature adopted a law restricting future lawsuits over hog farm nuisances. The new law does not affect the ongoing complaints.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. \_\_\_\_\_ Caption: In re Murphy-Brown LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Murphy-Brown LLC  
(name of party/amicus)

who is Petitioner, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
  
2. Does party/amicus have any parent corporations? ☒ YES ☐ NO  
 If yes, identify all parent corporations, including all generations of parent corporations:  
 The sole member of Murphy-Brown LLC is John Morrell & Co., which is a wholly-owned subsidiary of Smithfield Foods, Inc. In turn, Smithfield Foods, Inc. is owned by United Global Foods (US), Inc., which is owned by Ipopema 127, which is owned by SFDS Malta Limited, which is owned by Rotary Vortex Limited, which is owned by WH Group Limited.
  
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO  
 If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☒ NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Stuart A. Raphael

Date: 7/9/2018

Counsel for: Murphy-Brown LLC

### CERTIFICATE OF SERVICE

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I certify that on July 9, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Stuart A. Raphael  
(signature)

7/9/2018  
(date)